153 U S 228

153 U.S. 228

RECORD, CASE No. 14,376.

LAW ASSOCIATION
PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~582.~~ 326

JOHN M. BURKE, APPELLANT,

vs.

RICHARD H. DULANEY AND JOHN SOUTHGATE LEMMON, EXECUTORS OF H. GRAFTON DULANEY, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED OCTOBER 23, 1890.

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1 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

Pleas begun, continued, and held in the district court of the first judicial district of the Territory of Idaho in and for Shoshone county by the plaintiff filing his complaint in the said action on the 7th day of October, A. D. 1887, and judgment rendered in favor of the plaintiff and against the defendant by and before the Hon. John L. Logan, judge of said court, at Murray, Shoshone county, Idaho Territory, on the 20th day of December, A. D. 1888.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

Be it remembered that on the 7th day of October, A. D. 1887, the plaintiff, H. Grafton Dulaney, filed his complaint in the above-entitled action in said court; which said complaint is in words and figures as follows, to wit:

2 *Complaint.*

In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. } Complaint on Promissory Note.

H. Grafton Dulaney, plaintiff in the above-entitled action, complaining of the above-named defendant and for cause of action alleges and shows to the court that on the 10th day of August, 1883, at the city and county of Salt Lake, Utah Territory, the said defendant, John M. Burke, made his certain promissory note in writing, bearing date on that day; which said promissory note is in the words and figures following, to wit:

$4,308.80. SALT LAKE CITY, UTAH, *August 10th*, 1883.

One year after date, for value received, I promise to pay to H. Grafton Dulaney or order forty-three hundred and eight $\frac{80}{100}$ dollars at Wells, Fargo & Co.'s bank, Salt Lake City, Utah, with interest at the rate of six per cent. per year from date until paid.

(Signed) JNO. M. BURKE.

And then and there delivered the said promissory note to the said plaintiff, H. Grafton Dulaney; that the said plaintiff is now the

lawful owner and holder of the said promissory note; that no part of the said promissory note has been paid, although payment thereof has been demanded of and from said defendant according to
3 the tenor and effect thereof, but no part of the principal or interest thereof has been paid.

That there is remaining unpaid to the said plaintiff on said promissory note the sum of four thousand three hundred and eight dollars and $\frac{80}{100}$, the said principal sum, with interest thereon, at the rate of six per cent. per annum, from the date thereof, to wit, August 10th, 1883.

Wherefore the said plaintiff prays judgment against the said defendant for the sum of four thousand three hundred and eight and $\frac{80}{100}$ dollars and interest thereon up to the date of the rendition of judgment herein, at the rate of six per cent. per annum, from the 10th day of August, 1883, and the costs of suit, and that said judgment be rendered and made payable in and bear interest pursuant to law.

M. C. ATHEY AND
GANAHL & HAGAN,
Attorneys for Plaintiff.

Verification.

TERRITORY OF IDAHO, }
County of Shoshone, } *ss:*

M. C. Athey, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; that the plaintiff is a
4 non-resident of Idaho Territory and is absent therefrom and from Shoshone county, Idaho, where this affiant resides, from and where all the attorneys reside. The affiant is conversant with all the facts set out herein from letters, correspondence, and telegrams from the plaintiffs and others and having been told of the facts herein, and therefore makes this affidavit for plaintiff on such information and belief.

M. C. ATHEY.

Subscribed and sworn to before me this 5th day of October, A. D. 1887.

[SEAL.] JOHN S. ATCHINSON,
Notary Public.

Indorsed: No. 313. In the district court, first district, Idaho Territory, county of Shoshone. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Complaint on promissory note. Filed October 7th, 1887. F. E. Lucas, clerk. Ganahl & Hagan, attorneys for plaintiff.

And afterwards and on, to wit, the 17th day of October, 1887, the defendant filed his demurrer to the complaint herein; which said demurrer to complaint is in words and figures as follows, to wit:

Demurrer.

In the District Court of the First Judicial District, Idaho Territory, in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. } Demurrer to Complaint.

The defendant in the above-stated case demurs to the complaint of the plaintiff therein, and for grounds of demurrer alleges that said complaint does not state facts sufficient to constitute a cause of action.

W. B. HEYBURN,
Attorney for Defendant.

Indorsed: No. 313. District court of the 1st judicial district of Idaho Territory in and for Shoshone county. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Demurrer to complaint. Filed the 17th day of September, 1887. F. E. Lucas, clerk. W. B. Heyburn, attorney for defendants.

And afterwards and on, to wit, the 4th day of November, 1887, the defendant filed his answer herein; which said answer is in words and figures as follows, to wit:

Answer.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. }

Now comes the above-named defendant and, answering the complaint of the above-named plaintiff, says:

It is true that he made and delivered the promissory note in said complaint set forth as therein set forth in form, but alleges *that* the truth to be that at the time the said note set forth, to wit, on the 10th day of September, 1883, the said H. Grafton Dulaney was
6 about to purchase two mining properties, known as the Live Yankee and the Mary Ellen, situated in American Fork mining district, in the Territory of Utah, of M. Cullen and Dennis Ryan, and proposed to defendant to purchase jointly with him in said properties, together purchasing a half interest in each of said properties. Defendant agreed with plaintiff that he might take the deed for said properties in their joint names, and he would represent

the payment for the interests he would take under the deed by a note payable in one year, which is the note upon which this suit is brought, and that he, the said defendant, would go into possession of and take charge of said properties, and explore and develop the same, and if at any time during the running of said note, to wit, one year, the defendant concluded not to take or retain the interest in said deed conveyed to him, that the said note should not become due, but should be delivered up to the said defendant, and defendant should make a deed to plaintiff for the interest which defendant received under said deed to said two mining claims.

That defendant did go upon said property, under said arrangement as aforesaid, and did explore and mine upon them until he had satisfied himself that he did not desire to take the interest expressed in said deed, as conveyed to him, at the price or sum expended in said note; whereupon he wrote and notified said plaintiff that he did not want said interest at said or any price, and that he was about to leave said Territory for Idaho; that thereupon said

7 plaintiff proceeded to let contracts upon and worked said mine for more than a year afterward without consulting or advising with defendant, and operating the same as his own property, and defendant supposed and now believes that said plaintiff considered said note to be cancelled and himself, the plaintiff, sole owner of said half interest in said two properties taken by deed in the joint names of plaintiff and defendant.

That the period of one year had not expired from the date of said note when said defendant notified plaintiff as aforesaid of his intention not to take the said interest in said properties and of the facts aforesaid; that defendant has not seen plaintiff since making said note; that said note has never been presented to him for payment and he has never been notified by or on behalf of said plaintiff that the same was claimed to be due or that any claim was made against him for the amount expended therein or any amount.

And he, the defendant, has ever stood ready and now stands ready to make, execute, and deliver to the said plaintiff a good and sufficient deed conveying to him the interest in said two mining claims aforesaid, as by the terms of the agreement aforesaid existing between plaintiff and the defendant he might do, in full satisfaction of said promissory note and the amount expended therein.

Wherefore defendant prays the judgment of this court that the decree and judgment entered herein shall direct the plaintiff to deliver up and surrender to defendant the promissory note in said complaint recited upon the delivery by the defendant to

8 plaintiff of the deed for the interest in said Live Yankee and Mary Ellen lodes claims, taken in the name of said defendant so as aforesaid; which deed is herewith tendered to plaintiff in form.

And that thereupon defendant may go without day and receive and have judgment for the costs and disbursements herein, and that plaintiff take nothing by his said action.

W. B. HEYBURN,
Attorney for Defendant.

Verifycation.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

John M. Burke, being first duly sworn according to law, doth depose and say that he is the defendant in the above-stated action, and that he has heard read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those things therein stated on information and belief, and as to these matters he believes them to be true.

JOHN M. BURKE.

Subscribed and sworn to before me this 4th day of November, 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

Indorsed: No. 313. In the district court, 1st judicial district, in and for Shoshone county, Idaho Territory. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Answer. Filed the 4th of November, 1887. F. E. Lucas, clerk. W. B. Heyburn, attorney for defendants.

9 And afterwards and on, to wit, the 5th day of June, 1888, the plaintiff filed his motion and notice of motion herein; which said motion and notice of motion *is* in words and figures as follows, to wit:

Notice of Motion for Judgment on Pleadings.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. } Notice of Motion.

The defendant and his attorneys and each of them please take notice—

That upon the complaint and answer herein and the files of said action we shall move the said court at the court's room thereof, in the town of Murray, county of Shoshone, Territory of Idaho, on the 14th day of June, 1888, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for judgment in the said case upon the pleadings, upon the grounds, among other-, as stated in the motion served herewith and upon the general ground that the answer herein does not state facts sufficient to constitute a defense herein. The motion will be made and based upon the

aforesaid grounds, and at the hearing thereof the papers and files of this action will be used thereupon.

GANAHL & HAGAN,
Attorneys for Plaintiff.

To W. B. Heyburn, Esq., attorney for defendant.

10 Service of a true copy of the foregoing notice of motion accepted this the 5th day of June, 1888.

W. B. HEYBURN,
Attorney for Defendant.

Indorsed: No. 313. In the district court, 1st judicial district, Idaho Territory, in and for Shoshone county. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Motion. Notice of motion. Original filed June 5th, A. D. 1888. B. F. Morris, clerk, by Barry N. Hillard, deputy.

Motion for Judgment on Pleadings.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone county.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. } Motion.

Now comes the above-named plaintiff and moves the court for a judgment herein, upon the pleadings, upon the following grounds, to wit:

First. That there has been no legal or sufficient defense to the action herein set up or pleaded in the answer of defendant.

Second. That the answer herein does not state facts sufficient to constitute a defense to the action.

Third. That the facts stated in said answer constitute no defense in any manner to plaintiff's action on said note.

Wherefore the plaintiff asks the judgment of the court upon the pleadings herein, as prayed for in the complaint, together with costs.

11

GANAHL & HAGAN,
Attorneys for Plaintiff.

Service of a true copy of the foregoing motion accepted this 5th day of June, 1888.

W. B. HEYBURN,
Attorney for Defendant.

And afterwards and on, to wit, the 23rd day of June, 1888, the defendant filed his amended answer herein; which said amended answer is in words and figures as follows, to wit:

Amended Answer.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff.
vs.
JOHN M. BURKE, Defendant.

Defendant, by leave of court, files this his amended answer and alleges that the note mentioned and set forth in the complaint was given for the consideration and under the conditions following, to wit: On the 10th day of August, 1883, plaintiff had negotiated the purchase of the two mining properties situated in American Fork mining district, Utah county, Utah Territory, being the undivided half of the properties known as the Live Yankee Lode claim and the Mary Ellen Lode claim, of and from M. Cullen and Dennis Ryan, and orally agreed with this defendant that he would purchase the said properties and give this defendant the option of becoming the owner of the undivided one-sixth of each of said claims for the same price plaintiff paid for the said interests, to be paid by the defendant to plaintiff one year after date in the event defend-
12 ant should desire to become the purchaser and owner of said interests; and defendant thereupon agreed to accept such option of purchase, and the plaintiff thereupon bought the said property.

Defendant further alleges that in the consum-ation of the purchase of said properties, at the instance solely of plaintiff, the conveyance therefor was taken in the joint names of plaintiff and defendant, and plaintiff requested defendant to give his note for his share of the purchase price, the same being the sum of $4,308.80, as set forth in the note declared upon, payable one year after date, and then and there agreed with defendant that the defendant could explore, work, and develop said mining claim, and if at any time before the maturity of said note defendant should desire so to do he could relinquish said option of purchase, and that plaintiff would cancel said note and accept a reconveyance of the interest so deeded to defendant in said mining claims in full discharge of said note and cancellation thereof; and defendant accepted the conveyances of said claims and executed said note upon the agreement aforesaid, and the consideration of said note was none other or different.

Defendant alleges that in pursuance of said agreement he entered upon said mining claim and explored and worked the same, and long prior to the expiration of one year after said note was given became dissatisfied with said properties and relinquished his option in said properties, and at the time aforesaid, to wit, about March, 1884, defendant notified plaintiff that he relinquished his option of purchase of said properties and proffered his readiness and
13 willingness to convey the interest so appearing in his name of, in, and to said mining claims, at his, defendant's, own

proper expense, at any time upon demand; and thereupon defendant during the said year 1884, in the month of March, 1884, vacated said property, and plaintiff entered upon and worked the same.

Defendant alleges that he has always been ready and willing to make a good and sufficient conveyance of said interests in said mining claims so conveyed — him as aforesaid to the plaintiff, and that he brought a deed into court with his original answer herein, which said deed he now here tenders to the plaintiff.

Defendant asks judgment that said note sued for be cancelled, and that he have judgment for costs.

WOODS & HEYBURN,
Attorneys for Defendant.

Verification.

TERRITORY OF IDAHO, } ss:
County of Shoshone. }

John M. Burke, being duly sworn, on his oath says that he is defendant herein; that he knows the statements in the foregoing answer, and that the same are true of his own knowledge.

JNO. M. BURKE.

Subscribed and sworn to before me this 16th day of June, 1888.

[SEAL.] BARRY N. HILLARD,
Notary Public.

14 Indorsed: No. 313. In the district court, Shoshone county, Idaho Territory, 1st judicial district. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Amended answer. Filed 23rd day of June, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 7th day of July, 1888, the plaintiff filed his notice of motion herein; which said notice of motion is in words and figures as follows, to wit:

Notice of Motion Excepting to Sureties.

In the District Court of the First Judicial District of Idaho Territory in and for the County of Shoshone.

H. GRAFTON DULANEY, Plaintiff, }
vs.
JOHN M. BURKE, Defendant. }

To W. B. Heyburn, attorney for said defendant, and to said defendant:

You and each of you will please take notice that the defendant has excepted to the sufficiency of the sureties to the undertaking herein filed on the 2nd day of July, 1888, wherein said sureties

undertake to pay to the plaintiff any judgment that might be rendered herein against the said defendant, and that you are hereby required to produce the said sureties before the judge of the said court, or some one to be by him appointed, at such time and
15 place as you yourself may designate by notice to me, where the said sureties shall justify and be examined as to their sufficiency and qualifications.

You and each of you will please further take notice that on Monday, the 16th day of July, 1888, at 10 o'clock a. m. of said day, the plaintiff will move the said court, in the court-room thereof, at the opening of the court on said day, or as soon thereafter as counsel can be heard, that the plaintiff have judgment herein upon the pleadings, and that the answer of the defendant, if permitted to be filed herein, be stricken from the files of the said court, and be declared for naught, upon the grounds, among others, that the said answer does not state facts sufficient to constitute a defense to the action herein, and that no sufficient bond herein has ever been filed, as required by the order of the court, as a condition for filing said amended answer.

And, further, that the answer, if taken as true, constitutes no defense to the action herein.

Yours, ALBERT HAGAN.

Service of the foregoing notice of motion hereby accepted by a true copy thereof this — day of July, 1888.

Indorsed: No. 313. In the district court of the first judicial district, Idaho Territory, county of Shoshone. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Notice of motion. (Original.) Service accepted July 7th, 1888. Woods & Heyburn,
16 attorneys for defendant. Filed July 7th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the first day of August, A. D. 1888, the judge of said court filed his decision in writing, denying the plaintiff's motion for judgment on the pleadings herein; which said "decision" is in words and figures as follows, to wit:

DULANEY *vs.* BURKE } Motion for Judgment on Pleadings.

The plaintiff in this action would undoubtedly be entitled to jugdment if the agreement pleaded in defense was an oral one.

Specht *vs.* Howard, 16 Wallace, 564.

Daniel on Neg., Ins. 12–61, sec. 80.

Order Denying Motion for Judgment on Pleadings.

It does not appear, however, that the agreement was an oral one. The defendant, as appears by his answer on top page 2, alleges that plaintiff "then and there agreed with defendant." This court can-

not say whether the agreement was in writing or not, and certainly cannot presume the agreement to be an unlawful one. Upon an examination of Bliss on Code Pleading and authorities there cited, this motion must be denied.

JOHN L. LOGAN, *Judge*.

[Endorsed:] No. 313. H. Grafton Dulaney *vs.* John M. Burke. Motion denied. Memorandum. Filed August 1st, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 23rd day of August, 1888, the plaintiff filed his notice of motion herein; which said notice
17 of motion is in words and figures as follows, to wit:

Notice of Motion to Make Amended Answer More Definite.

In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. } Notice of Motion.

To the said defendant and to Messrs. Woods & Heyburn, his attorneys:

You and each of you will please take notice that on the 17th day of September, A. D. 1888, at the town of Murray, Shoshone county, Idaho Territory, at the court-room of said court, at ten o'clock a. m. of said day, or as soon thereafter as counsel can be heard, we shall move the court for an order that the defendant be compelled, within a time to be limited by the court, to make his amended answer herein more definite and explicit, in this: That the said defendant be compelled to state and allege whether the contracts and agreements set up in the answer herein as a defense to the action were verbal agreements or whether they were in writing, and, if in writing, to make a proffer of the same, and if said agreement was verbal to so state.

GANAHL & HAGAN,
Attorneys for Plaintiff.

[Endorsed:] No. 313. In the district court, Shoshone county, Idaho Territory, first judicial district. H. Grafton Dualney, plaintiff, *vs.* John M. Burke, defendant. Notice of motion. Filed August 23rd, A. D. 1888. F. H. Grierson, clerk, by John P. Sheehy,
18 deputy. Copy received August 29th, 1888. Woods & Heyburn, for defendants. Ganahl & Hagan, att'ys for plaintiff.

And afterwards and on, to wit, the 23rd day of August, 1888, the plaintiff filed his motion herein; which said motion is in words and figures as follows, to wit:

Motion to Make Amended Answer More Definite.

In the District Court of the First Judicial District of the Territory of Idaho, in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant. } Motion.

Now comes the said plaintiff and moves the court for an order that the defendant be compelled, within a time to be limited by the court, to make his amended answer herein more definite and explicit, in this: That the said defendant be compelled to state and allege whether the contracts and agreements set up in the answer herein as a defense to the action were verbal agreements or whether they were in writing, and, if in writing, to make a proffer of the same, and if said agreement- were verbal to so state.

GANAHL & HAGAN,
Attorneys for Plaintiff.

Indorsed: No 313. In the district court, 1st judicial district, in and for Shoshone county, Idaho Territory. H. Grafton Du-
19 laney, plaintiff, *vs.* John M. Burke, defendant. Motion. Filed August 23rd, A. D. 1888. F. H. Grierson, clerk, by John P. Sheehy, deputy. Copy re'd August 29th, 1888. Woods & Heyburn, for defendant. Ganahl & Hagan, att'ys for plaintiff.

And afterwards and on, to wit, the 18th day of December, 1888, the plaintiff filed a certain promissory note herein as an exhibit; which said promissory note is in words and figures as follows, to wit:

$4,308.80. SALT LAKE CITY, UTAH, *Aug. 10th*, 1883.

One year after date, for value received, I promise to pay H. Grafton Dulaney or order forty-three hundred and eight $\frac{80}{100}$ dollars at Wells, Fargo & Company's bank, Salt Lake City, Utah, with interest at the rate of six per cent. per year from date until paid.

JOHN M. BURKE.

No. 1.

Indorsed: No. 313. H. Grafton Dulaney *vs.* John M. Burke. Pl'tiff's Ex. "A." Date, Dec. 18th, 1888. Filed Dec. 18th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 20th day of December, 1888, the court filed its findings of fact & conclusions of law herein; which said findings of fact & conclusions of law are in words and figures as follows, to wit:

Findings of Facts and Conclusions of Law.

In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

20 H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

This cause came on regularly for trial at this the December term, A. D. 1888, of said court, to wit, on the 18th day of December, 1888, in open court, and was tried before Hon. John L. Logan, judge of said court, sitting without a jury, a jury having been expressly waived in open court by both of the parties hereto. Albert Hagan appearing as attorney for plaintiff and Messrs. Woods & Heyburn appearing as attorneys for the defendant, the trial then and there proceeded, and, both parties having introduced their testimony and respectively rested, the cause was then, in open court, submitted to the court for decision, and the court, being fully advised, both upon the law and the facts herein, finds for the plaintiff, as prayed for in the complaint herein, and now finds the following facts and conclusions of law herein, to wit:

Findings of Facts.

First. That on the 10th day of August, 1883, at Salt Lake City, Utah Territory, the defendant, John M. Burke, being then and there indebted to plaintiff in the sum of four thousand three hundred and eight dollars and eighty cents ($4,308.80), made his certain promissory note in writing for said sum, bearing date on said day, in words and figures as set out in the complaint herein, and then and there delivered said note to plaintiff, who is the payee mentioned therein.

21 Second. That said plaintiff was from said date and has been the owner of said note, and no part thereof has ever been paid, and the same is overdue and wholly unpaid, with interest thereon at the rate of six (6) per cent. per annum from said date.

Third. That all and singular the allegations of said complaint are true and the allegations of the answer herein are not found to be true.

Conclusions of Law.

As a conclusion of law herein I find that the plaintiff is entitled to judgment against said defendant for the sum of four thousand three hundred and eight dollars and eighty cents ($4,308.80), with interest at the rate of six (6) per cent. per annum from August 10th, 1883, to this date, and for costs of suit.

JOHN L. LOGAN,
Judge of said Court.

December 18th, 1888, in open court.

Principal	$4,308 80
Interest	1,384 00
Total	$5,692 80

Indorsed: No. 313. First judicial district court, Idaho Territory, Shoshone county. H. Grafton Dulaney *vs.* John M. Burke. Findings. Filed December 20th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards, and on, to wit, the 20th day of December,
22 1888, the plaintiff filed his judgment herein; which said judgment is in words and figures as follows, to wit:

Judgment.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

This cause came on for trial at this the December term, A. D. 1888, in open district court, upon the complaint and amended answer herein, Albert Hagan, Esq., appearing as attorney for this plaintiff, and Messrs. Wood & Heyburn as attorneys for the defendant, and both parties in open court waive a jury trial, and agree to try this cause before the judge, sitting without a jury; whereupon the trial proceeded and the parties introduced their testimony, and both then rested their case; whereupon the case is submitted to the court, and the court, being fully advised herein, finds for the plaintiff, as prayed for in the complaint herein, and against said defendant, John M. Burke, and the court files its findings herein, and judgment is ordered accordingly.

Wherefore, by reason of the law and the premises herein, the court being fully advised, it is ordered, adjudged, and decreed by the court that the plaintiff, H. Grafton Dulaney, do have and recover of and from the defendant, John M. Burke, the sum of five thousand six hundred and ninety-two dollars and eighty cents ($5,692.80).

23 It is further ordered, adjudged, and decreed herein that the plaintiff have and recover of and from said defendant his costs herein taxed and amounting to the sum of forty and $\frac{40}{100}$ dollars ($40.40), and that the plaintiff have execution herein for the enforcement of this judgment.

JOHN L. LOGAN,
District Judge and Judge of said Court.

In open court the 18th day of December, 1888.
Attest: F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD,
[SEAL.] *Deputy Clerk.*

Indorsed: No. 313. In the district court, Shoshone county. H. Grafton Dulaney *vs.* John M. Burke. Decree. Filed December 20th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 20th day of December, A. D. 1888, the clerk made up and filed the judgment-roll herein; the certificate to which said judgment-roll is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

I, the undersigned, clerk of the district court of the first
24 judicial district of said Territory in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book "B" of said court, on page 54; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 20th day of December, 1888.

[Seal District Court.]

F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD,
Deputy Clerk.

Indorsed: No. 313. In the district court, Shoshone county, Idaho, 1st judicial district. H. Grafton Dulaney, plaintiff, *vs.* John M. Burke, defendant. Judgment-roll. Filed December 20th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 27th day of December, A. D. 1888, the defendant filed his notice of intention to move for a new trial herein; which said notice of motion is in words and figures as follows, to wit:

Notice of Intention to Move for a New Trial.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.
Notice of Intention to Move for a New Trial.

Please take notice that the defendant in the above-entitled
25 action intends to move for a new trial upon the following grounds and specifications of errors, to wit: Errors of law

occurring upon trial and excepted to at the time; in sustaining the objections to testimony of John M. Burke, the defendant, in relation to the agreement made by said Burke with the plaintiff and set up in his answer, the said ruling being excepted to at the time; and, further, in sustaining the objection to the testimony of the said defendant in regard to the deed made by the defendant to the plaintiff, excepted to at the time, and also to the refusal of the court to allow the defendant to testify as to the consideration for which the note declared on in the complaint was given, excepted to at the time; and on this motion the defendant will rely, upon the pleadings in the action and minutes of the court, his bill of exceptions herein, and statement on motion for a new trial.

WOODS & HEYBURN,
Attorneys for Defendant.

To the said plaintiff and to M. C. Athey, Albert Hagan, and Frank Ganahl, his attorneys.

Indorsed: No. 313. In the district court, Shoshone county, Idaho. H. Grafton Dulaney *vs.* John M. Burke. Notice of intention to move for a new trial. Filed December 27th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Copy rec'd Dec. 27th, 1888. Albert Hagan, attorney for pl't'ff. Woods & Heyburn, att'ys for defendant.

And afterwards and on, to wit, the 5th day of January, A. D. 1889, the defendant filed his bill of exceptions herein; which
26 said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

Be it remembered that on the eighteenth day of December, 1888, at a term of said court then being held, the Hon. John L. Logan presiding, the following proceedings were had in the above-entitled cause, to wit:

Said plaintiff, by Albert Hagan, his attorney, offered in evidence the note mentioned in the complaint herein and called as his own witness the said defendant, John M. Burke, who testified that the signature to the said promissory note was the signature of him, the said Burke.

Whereupon the plaintiff rested his case.

Whereupon the said defendant, to maintain the issues on his part, was produced and sworn as a witness on his own behalf, and, being examined in chief by his attorneys, W. B. HEYBURN, Esq., testified as follows, viz:

Q. State whether or not any consideration ever passed for the note you have just identified.

To which question the plaintiff's counsel then and there objected upon the ground that the same is immaterial, incompetent, and inadmissable, and the court sustained the objection; to which
27 ruling of the court defendant, by his counsel, then and there excepted.

Q. State the circumstances of the case.

COURT: State the circumstances under which you gave that note.

A. Mr. Dulaney bought this group of mines—the Live Yankee and the Mary Ellen. He came to the Walker house, in Salt Lake, and wanted me to run them for him. I said I would not do it unless I got a show to get some interest in the property. He says, I will carry an interest for you and you can take it, if you want it, and if not you can give it back to me after you see the property.

Counsel for the plaintiff objects to this testimony of the witness.

PLAINTIFF: Was that agreement oral or in writing?

A. All oral.

Plaintiff here objects to the testimony to vary the terms of the contract, the agreement being in writing. Objection sustained by the court. Exception taken by the defendant.

Q. State what was done, Mr. Burke.

PLAINTIFF: What was done in what?

Q. At that time.

Counsel for the plaintiff objects to the question as being indefinite and immaterial, what was done.

Q. What was done at the time and in pursuance of the giving of this note?

Counsel for the plaintiff objects to what was done in pursuance of a contract that was oral.

COURT: What was done, Mr. Burke?

28 A. I went to examine the property. Mr. Dulaney agreed to let me have this one-sixth interest on a year's option from the time I took charge of the property—management of it—and went to work on it. Some time after taking the management of it and working of it his cousin came out, Mr. Roger Dulaney, and he told me——

Counsel for the plaintiff objects to what Mr. Roger Dulaney told witness.

A. The note had not been given at this time, and he said——
COURT: Was this before the note was given?
A. Yes; it led up to the note.

Objection sustained by the court and exception taken by defendant.

Counsel for the defendant here offers to prove the conversation with the agent of the payee of the note prior to the making of the note and the circumstances under which the note was given.

COURT: Under the allegations in the answer the court excludes the testimony.

Defendant excepts.

Q. State what was done, omitting what was said—state what you have done since the giving of this note.

A. I gave the note. I worked on the property, which was done some time in September; worked the property until March; settled up all of its debts, paid them, notified Dulaney I wanted nothing more to do with the property; that I was going to Idaho Territory, to Cœur d'Alene mines, and *as* I was ready to give him a
29 deed at any time he would send me my note. That is all.

Counsel for the defendant offers to prove that at the time of the giving of the note and prior thereto Dulaney, the payee of the note, agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price of the interest that Mr. Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned.

COUNSEL FOR THE PLAINTIFF: Oral agreement, was it?
DEFENDANT: Yes; but before the making of the note.
A. It was all oral agreement. His word was good.

Whereupon counsel for the plaintiff objects to the testimony as incompetent and immaterial.

Counsel for the defendant also offers to prove that after inspecting the property and testing it Mr. Burke notified Mr. Dulaney that he did not want the interest; that he was prepared to make a deed for the interest to Mr. Dulaney, and demanded the delivery of his note.

To all of which testimony the plaintiff objects as wholly incompetent.

The COURT: It appearing from the evidence the agreement regarding the note was not in writing, and under the allegations of the answer the court excludes the evidence.

DEFENDANT: This conversation was all prior to the making of the note, and offers parole evidence, which the court excludes as above stated.

Counsel for defense offers to prove that at the time the note
30 was made, contemporaneous with the act, the same agreement was made orally between this plaintiff and the defendant.

Counsel for the plaintiff objects to this testimony also as totally incompetent, irrelevant, and immaterial; the defendant cannot be permitted to vary the terms of his contract.

Objection sustained by the court.

To which the defendant excepts.

Q. Were you present at the time the deed was made in your name for the interest in these mines?

A. I never was and never saw it.

Counsel for the plaintiff objects to this testimony as immaterial.

Which objection is sustained by the court; to which ruling the defendant excepts.

Q. State whether or not this deed for the interest in these mines mentioned in the answer was ever delivered to you at all.

A. Never was.

Counsel for the plaintiff objects to the evidence of the witness as immaterial and incompetent. The answer alleges that the deed was made in the joint names of plaintiff and defendant.

A. I was not there when the deed was made.

Q. State whether or not prior to your making the note the plaintiff agreed with you that you could explore, work, and develop the mining claims mentioned in the answer, and if at any time before the maturity of the said note you should desire so to do that
31 he would relinquish said option of purchase—that you could relinquish your said option of purchase, and that he, plaintiff, would cancel the note and accept the deed in full discharge of the note and the cancellation thereof.

Counsel for the plaintiff objects to the question until the parties produce the agreement.

The defendant admits that the agreement is oral, and on this ground the evidence is excluded by the court.

Q. State whether or not the plaintiff made that agreement with you that I have just stated prior to your making the note and agreeing to give it.

Counsel for the plaintiff objects to the question until the agreement is produced in writing. Objection sustained by the court; to which the defendant excepts.

Q. State whether or not you did examine, work, and develop the mining claims mentioned in the answer.

Counsel for the plaintiff objects to the question as irrelevant and immaterial.

We ask the facts, whether he did or not.

Objection sustained. Exception taken by the defendant.

Q. State whether or not you refused to take the mining claim mentioned in the answer under the agreement or any agreement you had with the plaintiff.

Counsel for the plaintiff objects to the question as immaterial and incompetent.

Objection sustained. Exception taken.

(Deed filed in the case shown to witness, and he is asked to say what it is.)

32 PLAINTIFF: That is the deed he tenders back in his answer?

DEFENDANT: Yes.

A. This is the deed of mine to Mr. Dulaney for the property in dispute.

Counsel for the plaintiff objects to it as being incompetent and immaterial.

Deed offered in evidence by the defense, which is as follows:

This indenture, made the second day of November, in the year of our Lord one thousand eight hundred and eighty-seven, between John M. Burke, of the town of Wardner, in the county of Shoshone and Territory of Idaho, the party of the first part, and H. Grafton Dulaney, of the Territory of Utah, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the surrender of a certain promissory note bearing date August 10th, 1883, made by said Burke, payable to H. Grafton Dulaney one year after date, for the sum of four thousand three hundred and eight $\frac{80}{100}$ dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to his heirs and assigns all the right, title, interest and estate of the said John M. Burke, in and to those two certain quartz lode mining claims situated in the American Fork mining district in the Territory of Utah, known
33 as and called the Live Yankee and the Mary Ellen lode claims.

Together with all dips, spurs and angles, and also all the metals, ores, gold- and silver-bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereunto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

It is expressly covenanted that it is intended hereby to convey any and all right, title, interest and estate, which may hereafter be acquired to said premises or any part thereof, by virtue of any patent which may hereafter be issued by the United States Government therefor, under proceedings heretofore instituted in that behalf.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

(Signed) JOHN M. BURKE. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

34 TERRITORY OF IDAHO, } ss.
County of Shoshone. }

On this 2nd day of November, 1887, before me, Thomas E. McLelland, a notary public in and for said county, personally appeared John M. Burke, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Murray, the day and year in this certificate first above written.

THOS. E. McLELLAND,
[SEAL.] *Notary Public.*

Indorsed: Defendant's Exhibit "A." deed of a mining claim. John M. Burke to H. Grafton Dulaney.

To which the plaintiff excepts.

It is dated long after the commencement of the suit and is — pursuance of the oral agreement, and also as incompetent, immaterial, and irrelevant and no defense to the action under the pleadings.

The court rules that it is inadmissible in the evidence unless the defendant proposes to show the plaintiff accepted the deed.

Defendant asks to have paper marked Defendant's Exhibit "A."

Objection sustained. Exception taken by the defendant.

Q. When did you last see Mr. Dulaney?

A. August or September, 1883, I guess.

35 Q. State whether it was before or after you had completed your exploration and examination of these premises.

Counsel for the plaintiff objects to the question as incompetent and immaterial.

Objection sustained and exception taken by the defendant.

Q. State whether or not you have seen Mr. Dulaney or know his whereabouts since you determined on not taking an interest in these mining claims.

Counsel for the plaintiff objects to the question as incompetent, irrelevant, and immaterial.

Objection sustained and exception taken by the defendant.

Q. Was there any other or further consideration of the note that has been shown you than this interest in the mining claim?

Counsel for the plaintiff objects to question as incompetent and immaterial.

The COURT: The answer sets up what the consideration was.

Objection sustained. Exception taken by the defendant.

Q. State whether or not the deed that has been shown you describes the property mentioned in the answer.

Counsel for the plaintiff objects to the question as immaterial.
Objection sustained. Exception taken by defendant.

Defendant rests.

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial, and the court sustains the objection; to which ruling of the court defendant's counsel then and there excepted, and
36 defendant prays that this his bill of exceptions be signed and sealed by the court and made part of the records of this cause.

Approved and ordered on file Jan'y 5th, 1889.

JOHN L. LOGAN, *Judge.*

Attest:

F. H. GRIERSON, *Clerk,*
By BARRY N. HILLARD, *Deputy.* [SEAL.]

Indorsed: No. 313. H. Grafton Dulaney *vs.* John M. Burke. Bill of exceptions. Filed Jan'y 5th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 5th day of January, A. D. 1889, the court made and entered an order herein denying and overruling defendant's motion for a new trial herein; which said order is in words and figures as follows, to wit:

Order Overruling Motion for a New Trial.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

Entry in court record twentieth judicial day, Saturday, January 5th, A. D. 1889:

Order overruling and denying the defendant's motion for a new trial.

At this day came the plaintiff, by Albert Hagan, Esq., his counsel, and the defendant, by Messrs. Woods & Heyburn, his counsel, ap-

peared also, and the defendant's motion for a new trial herein came on to be heard by the court, and, after hearing the arguments
37 of counsel and being fully advised in the premises, the court denied the said motion.

And afterwards and on, to wit, the 7th day of January, A. D. 1889, the defendant filed his notice of appeal herein; which said notice of appeal is in words and figures as follows, to wit:

Notice of Appeal.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

You will please take notice that the defendant hereby appeals from the judgment made and rendered in the said court in said action on the 20th day of December, 1888, for the sum of $5,692.80 and costs, and from the whole of said judgment, to the supreme court of Idaho Territory. Said defendant also appeals to the supreme court of the Territory of Idaho from the order of the said district court on the 5th day of January, 1889, overruling his motion for a new trial. This appeal is taken upon questions of both law and fact.

WOODS & HEYBURN,
Attorneys for Defendant.

To the said plaintiff and M. C. Athey, Frank Ganahl, and Albert Hagan, his attorneys, and to F. H. Grierson, clerk of said district court.

Indorsed: Sheriff's office, January 8th, 1889.

38 *Service of Notice of Appeal.*

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

This notice came into my hands on the 8th day of January, 1889, and on the same day I served the same on the within-named plaintiff by personally delivering a true copy of the same to M. C. Athey, one of the attorneys for said defendant, at Wardner, Shoshone county, Idaho Territory.

T. F. HANLEY,
Sheriff, Shoshone County, Idaho Territory.

[Endorsed:] No. 313. In the district court, Shoshone county, Idaho. H. Grafton Dulaney *vs.* John M. Burke. Notice of appeal. Filed January 7th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, attorneys for def't.

And afterwards and on, to wit, the 11th day of January, A. D. 1889, the defendant filed his undertaking on appeal herein; which said undertaking on appeal is in words and figures as follows, to wit:

Undertaking on Appeal.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

Whereas the defendant in the above-entitled action appeals to the supreme court of the Territory of Idaho from a judgment made and entered against John M. Burke, defendant in said action, in the said district court, in favor of the plaintiff in the said action, on the 20th day of December, 1888, for five thousand six hundred and ninety-two dollars and $\frac{80}{100}$ dollars and forty and $\frac{41}{100}$ dollars, costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the county of Shoshone, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal and on the dismissal thereof, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant being desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of twelve thousand dollars, being double the amount named in the said judgment, that if the said judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay five thousand seven hundred and thirty-three and $\frac{20}{100}$ dollars, with interest, the amount directed to be paid by the said judgment, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal; and if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, upon motion of the respondent, in his favor against the undersigned sureties for said sum of $5,733.20, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellant upon the appeal.

Witness our hands and seals this 8th day of January, 1889.

ROBERT S. HARVEY. [SEAL.]
MICHAEL O'CONNOR. [SEAL.]
ABRAHAM B. GOLDSTEIN. [SEAL.]
ROBERT T. HORN. [SEAL.]

Justification of Undertaking.

TERRITORY OF IDAHO, }
County of Shoshone, } *ss:*

Abraham B. Goldstein, Robert T. Horn, Robert S. Harvey, and Michael O'Connor, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and a freeholder in the said county of Shoshone, Territory of Idaho, and are worth the sum of three thousand dollars each, aggregating $1,200.00, over and above all his just debts and liabilities, exclusive of property exempt of execution, and do each justify herein in the sum of three thousand dollars each.

ABRAHAM B. GOLDSTEIN.
ROBERT T. HORN.
ROBERT S. HARVEY.
MICHAEL O'CONNOR.

41 Subscribed and sworn to before me this 8th day of January, 1889.

[SEAL.] H. M. DAVENPORT,
Notary Public.

Indorsed: No. 313. In the District court, county of Shoshone. H. Grafton Dulaney *vs.* J. M. Burke. Undertaking on appeal. Filed January 11th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy clerk. Woods & Heyburn, attorneys for appellant.

And afterwards and on, to wit, the 12th day of February, A. D. 1889, the plaintiff filed his notice of exceptions to the sureties on the undertaking on appeal herein; which said notice of exception- to sureties is in words and figures as follows, to wit:

Notice of Exceptions to Sureties on Undertaking on Appeal.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff, }
vs.
JOHN M. BURKE, Defendant. }

Now comes the said plaintiff, by his attorney, and says that he excepts to the sufficiency of the sureties upon the undertaking herein upon the appeal and excepts to the sufficiency of each and every one of them, and says that they are wholly irresponsible for the amount for which they have become sureties. Plaintiff

42 further excepts to the sufficiency of the undertaking itself, both on account of the sureties and the form and substance, and says that the said undertaking is wholly insufficient in law.

M. C. ATHEY AND ALBERT HAGAN,
Attorneys for Plaintiff.

Copy received by us, at Boisé City, Idaho, February 7th, 1889.

WOODS & HEYBURN,
Attorneys for Def't.

Indorsed: No. 313. In the district court, Shoshone county. Exceptions to sureties. Filed February 12th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on, to wit, the 25th day of February, A. D. 1889, the defendant filed his notice for justification of sureties herein; which said notice for justification of sureties is in words and figures as follows, to wit:

Notice for Justification of Sureties.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

Please take notice that the sureties on the undertaking on appeal herein will justify before the Hon. J. C. Harkness, probate judge of said county, at his office, at Murray, Idaho, on the 28th day of February, A. D. 1889, at nine o'clock p. m. on said day, at which said time and place you can appear and examine the said sureties, if you see fit so to do.

WOODS & HEYBURN,
43 *Attorneys for Defendant.*

To the said plaintiff and to M. C. Athey and Albert Hagan, his attorneys.

Indorsed: Service accepted by copy this 23rd day of February, A. D. 1889, at Wardner, Idaho. M. C. Athey, attorney for plaintiffs. No. 313. In the district court, Shoshone county, Idaho. H. Grafton Dulaney *vs.* John M. Burke. Notice. Filed February 25th, A. D. 1889. F. H. Grierson, clerk, by John P. Sheehy, deputy.

And afterwards and on, to wit, the first day of March, A. D. 1889, a certain stipulation regarding the justification of sureties was filed herein; which said stipulation is in words and figures as follows, to wit:

Stipulation as to Justification of Sureties.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

It is hereby stipulated and agreed by and between the parties hereto that the justification of the sureties on the bond on appeal in the above-entitled action may be had at the town of Wardner, in Shoshone county, Idaho Territory, on the 28th day of February,
44 1889, at any time between the hours of 9 o'clock a. m. and five o'clock p. m. of said day.

M. C. ATHEY,
Of Attorneys for Plaintiff.
JNO. M. BURKE,
Defendant, in Person.

Indorsed: No. 313. In the district court, Shoshone county, Idaho. H. Grafton Dulaney *vs.* J. M. Burke. Stipulation. Filed March 1st, A. D. 1889. F. H. Grierson, clerk, by John P. Sheehy, deputy.

And afterwards and on, to wit, the 1st day of March, A. D. 1889, the defendant filed his undertaking on appeal herein as approved by the probate judge; which said undertaking on appeal is in words and figures as follows, to wit:

Undertaking on Appeal.

In the District Court of the First Judicial District in and for Shoshone County, Idaho.

H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.
Undertaking on Appeal for Money Judgment.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the Territory of Idaho from a judgment made and entered against him in said action in the district court in favor of the plaintiff in said action on the 20th day of December, A. D. 1888, for five thousand six hundred and ninety-two and $\frac{80}{100}$ dollars, lawful money of the United States, and forty and $\frac{40}{100}$ dollars, costs of suit, and from the whole thereof:

45 Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the county of Shoshone, Idaho Territory, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three

hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and acknowledge ourselves further jointly and severally bound in the further sum of twelve thousand dollars, lawful money of the United States, being double the amount named in the said judgment, that if the said judgment be affirmed or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay, in lawful money of the United States, five thousand seven hundred and eighty-three and $\frac{20}{100}$ dollars, with interest thereon, the amount directed to be paid by the said judgment, or the part of such amount as to which said judgment shall be affirmed, if affirmed only in part, and all the damages and costs which may be awarded against the appellant upon the appeal, and that, if the appellant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent,
46 in his favor against the undersigned sureties for said sum of five thousand seven hundred and thirty-three and $\frac{20}{100}$ dollars, together with interest that may be due thereon and the damages and costs which may be awarded against the appellant upon the appeal,

Witness our hands and seals this 28th day of February, 1889.

ABRAHAM B. GOLDSTEIN. [SEAL.]
ROBERT S. HARVEY. [SEAL.]
ROBERT T. HORN. [SEAL.]
MICHAEL FLAHERTY. [SEAL.]

Verification.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

Abraham B. Goldstein, Robert S. Harvey, Robert T. Horn, and Michael Flaherty, the persons whose names are subscribed to the foregoing undertaking as sureties thereto, being severally duly sworn, each for himself says as follows, to wit: The said Abraham B. Goldstein that he is worth the sum of three thousand dollars; the said Robert S. Harvey that he is worth the sum of three thousand dollars; the said Robert T. Horn that he is worth the sum of three thousand dollars, and the said Michael Flaherty that he is worth the sum of three thousand dollars, and each of said sureties says he is worth said *said* sum of three thousand dollars over and above his just debts and liabilities, exclusive of property exempt from execution and forced sale, and that he is a resident and freeholder within the Territory of Idaho.

ABRAHAM B. GOLDSTEIN.
ROBERT S. HARVEY.
47 ROBERT T. HORN.
MICHAEL FLAHERTY.

Subscribed and sworn to before me this 28th day of February, A. D. 1889.

[Seal Probate Court.]

J. C. HARKNESS,
Probate Judge.

Indorsed: No. 313. In district court, Shoshone county, Idaho. H. Grafton Dulaney *vs.* John M. Burke. Undertaking on appeal. Filed March 1st, A. D. 1889. F. H. Grierson, clerk, by John P. Sheehy, deputy.

Approval of Undertaking on Appeal by Probate Judge.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, J. C. Harkness, probate judge in and for said county, hereby certify that stipulation for the justification of sureties on bond on appeal to Supreme Court in cause entitled H. Grafton Dulaney *vs.* John M. Burke was exhibited to me to justify said sureties at the town of Wardner, in said county, between the hours of nine o'clock a. m. and five o'clock p. m. on the 28th day of February, A. D. 1889; that in pursuance of such stipulation the defendant appeared in person on the said day, at the hour of twelve o'clock m., and offered the following-named persons as sureties in the sum — three thousand dollars each, viz: Abraham B. Goldstein, Robert S. Harvey, Robert T. Horn, and Michael Flaherty; that the plaintiff appeared by M. C. Athey, Esq., and examined said sureties, and that upon said examination and upon a personal examination of the sureties by the probate judge it is hereby found that the bond offered
48 at such time by said appellant is correct, and that the sureties named therein are each residents and householders in the county of Shoshone, Idaho Territory, and are each worth the sum for which they became sureties therein over and above their just debts and liabilities; and it is therefore hereby ordered that said bond and the sureties thereon be, and is hereby, ordered approved, and the same is hereby approved.

Dated this 28th day of February, 1889.

J. C. HARKNESS,
Probate Judge.

Attest my hand and seal this 28th day of February, 1889.

J. C. HARKNESS,
[SEAL.] *Probate Judge and ex Officio Clerk Probate Court.*

Indorsed: No. 313. In the district court, Shoshone county, Idaho. H. Grafton Dulaney *vs.* John M. Burke. Justification of sureties. Filed March 1st, 1889. F. H. Grierson, clerk, by John P. Sheehy, deputy.

And afterwards and on, to wit, the 21st day of December, A. D. 1889, the defendant filed his præcipe for transcript herein; which said præcipe for transcript is in words and figures as follows, to wit:

Præcipe for Transcript for Appeal.

Præcipe.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

49 H. GRAFTON DULANEY, Plaintiff,
vs.
JOHN M. BURKE, Defendant.

To F. H. Grierson, clerk:

You are hereby requested to make transcript for appeal to the Supreme Court of the judgment-roll, inclusive of bill of exceptions filed January 5th, 1889, motion for new trial and order denying the same, notice of appeal, undertaking on appeal, with all papers in justification of sureties and on appeal.

WOODS & HEYBURN,
Attorneys for Defendant.

December 20th, 1889.

Indorsed: No. 313. H. Grafton Dulaney *vs.* John M. Burke. Præcipe for transcript. Filed December 21st, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

District Court Clerk's Certificate.

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

I, F. H. Grierson, clerk of the district court of the first judicial district of the Territory of Idaho in and for Shoshone county, do hereby certify that the above and foregoing papers, from page one to page seventy-one hereof, inclusive, in case No. 313, wherein H. Grafton Dulaney is plaintiff and John M. Burke is defendant,
50 to wit, the judgment-roll, which includes the complaint, demurrer to complaint, answer, amended answer, plaintiff's motion for judgment on the pleadings, order denying plaintiff's motion for judgment on the pleadings, plaintiff's notice of motion, and motion to have defendant make his amended answer more definite and explicit, the court's findings of fact and conclusions of law, judgment, and clerk's certificate to judgment-roll; also defendant's motion for a new trial and order denying the same; notice of appeal, undertaking on appeal, and notice of exception to sureties, notice for justification of sureties, stipulation, and undertaking on appeal as approved by the probate judge, have been by me compared with the originals now on file in my office and in my custody, and that the same is a full, true, and correct transcript of the same and of the whole thereof.

In testimony whereof I hereunto set my hand and the seal of said district court this 28th day of December, A. D. 1889.

F. H. GRIERSON, *Clerk*,
[SEAL.] By BARRY N. HILLARD,
Deputy Clerk.

51 Supreme Court of Idaho Territory, January Term, 1890.

BOISÉ CITY, IDAHO, *Jan.* 22*nd*, 1890.

Court met pursuant to adjournment.
Present: Hon. James H. Beatty, chief justice.
" Hon. C. H. Berry, associate justice.
" Hon. Willis Sweet, associate justice.
And the officers of the court.
When the following proceedings were had, among which was the following:

Order to Place on Supreme Court Calendar.

H. GRAFTON DULANEY, Pl'ff & Resp.,
v.
JOHN M. BURKE, Def't & App. } First District, Shoshone Co.

On motion of appellant, it is ordered that this case be placed upon the calendar.

Supreme Court of Idaho Territory, January Term, 1890.

BOISÉ CITY, IDAHO, *Jan.* 25*th*, 1890.

Court met pursuant to adjournment.
Present: Hon. James H. Beatty, chief justice.
" Hon. Willis Sweet, associate justice.
" Hon. C. H. Berry, associate justice.
And the officers of the court.
When the following proceedings were had, among which was the following:

52 *Order Granting Time to File Briefs.*

H. GRAFTON DULANEY, Pl'ff & Resp.,
v.
JOHN M. BURKE, Def't & App. } First District, Shoshone Co.

On motion of appellant, it is ordered that leave be given appellant until Feb. 1st, 1890, in which to file and serve briefs.

Supreme Court of Idaho Territory, January Term, 1890.

BOISÉ CITY, IDAHO, *February* 6*th*, 1890.

Court met pursuant to adjournment.
Present: Hon. James H. Beatty, chief justice.
" Hon. C. H. Berry, associate justice.
" Hon. Willis Sweet, associate justice.
And the officers of the court.

When the following proceedings were had, among which was the following:

Case Heard & Taken under Advisement.

H. GRAFTON DULANEY, Pl'ff & Resp.,
v.
JOHN M. BURKE, Def't & App. } First District, Shoshone Co.

This day this cause came on regularly for hearing, Woods & Heyburn appearing for appellant and F. Ganahl and Albert Hagan for respondent, and, after hearing the argument, the case was taken under advisement by the court.

53 Supreme Court of Idaho Territory, January Term, 1890.

BOISÉ CITY, IDAHO, *March 5th*, 1890.

Court met pursuant to adjournment.
Present: Hon. James H. Beatty, chief justice.
" Hon. C. H. Berry, associate justice.
" Hon. Willis Sweet, associate justice.
And the officers of the court.
When the following proceedings were had, among which was the following:

H. GRAFTON DULANEY, Pl'ff & Resp.,
v.
JOHN M. BURKE, Def't & App. } First District, Shoshone Co.

Order Affirming Judgment of Court Below.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Mr. Justice Sweet to the effect that the judgment of the court below be affirmed.
Mr. Justice Berry dissenting.
Whereupon it is now ordered, adjudged, and decreed by the court here that the judgment of the district court of the first judicial district in and for the county of Shoshone in the above-entitled cause be affirmed.

54 *Order Staying Remittitur.*

And it is ordered that a stay of remittitur be granted for sixty days for the perfecting of an appeal herein.

55 *Application for Appeal to U. S. Supreme Court.*

In the Supreme Court of Idaho Territory, January Term, A. D. 1890.

H. GRAFTON DULANEY, Plaintiff and Respondent,
versus
JOHN M. BURKE, Defendant and Appellant.

The above-named defendant and appellant, John M. Burke, conceiving himself aggrieved by the order and judgment entered on the fifth day of March, A. D. 1890, in the above-entitled cause, doth hereby appeal from said order and judgment to the Supreme Court of the United States, and he prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States.

WOODS & HEYBURN,
Attorney- for Defendant and Appellant, John M. Burke.

Order Granting Appeal.

And now, to wit, on May first, 1890, it is ordered that the appeal be allowed as prayed for.

JAS. H. BEATTY,
Chief Justice of the Supreme Court of Idaho Territory.

56 Endorsed: In the supreme court of Idaho Territory. H. Grafton Dulaney *vs.* John M. Burke. Defendant's appeal to Supreme Court of United States. Filed May 1st, 1890. Sol. Hasbrouck, clerk.

57 *Citation of Appeal.*

UNITED STATES OF AMERICA, *ss:*

To H. Grafton Dulaney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to an appeal filed in the office of the clerk of the supreme court of Idaho Territory, wherein John M. Burke is appellant and H. Grafton Dulaney is the respondent, to show cause, if any there be, why the judgment in the said writ of appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of May, A. D. 1890.

JAS. H. BEATTY,
Chief Justice of the Supreme Court of Idaho.

Endorsed: In the Supreme Court of United States. H. Grafton Dulaney *vs.* John M. Burk. Citation on appeal to Supreme Court of United States. Filed May 1st, 1890. Sol. Hasbrouck, clerk.

58 *Undertaking on Appeal.*

In the Supreme Court of Idaho Territory, January Term, A. D. 1890.

H. GRAFTON DULANEY, Plaintiff and Respondent,
versus
JOHN M. BURKE, Defendant and Appellant.
} Undertaking on Appeal from Money Judgment.

Whereas the defendant in the above-entitled action has appealed to the Supreme Court of the United States from a judgment made and entered against him in said action in the supreme court of Idaho Territory in favor of the plaintiff in said action, on the fifth day of March, A. D. 1890, for the sum of five thousand six hundred and ninety-two dollars and eighty cents and cost of suit on appeal to said supreme court of Idaho Territory, and from the whole thereof: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of Shoshone county, Idaho Territory, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and cost which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars; to which amount we acknowledge*d* ourselves jointly and severally bound; and whereas

59 the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of twelve thousand dollars, lawful money of the United States of America, being more than double the amount named in said judgment, that if the said judgment appealed from or any part thereof be affirmed or the appeal be dismissed the appellant will pay, in lawful money of the United States of America, the amount directed to be paid by the said judgment or the part of such amount as to which said judgment shall be affirmed, if affirmed only in part, and all damages and cost which may be awarded against the appellant upon the appeal; and

In witness whereof we have hereunto set our hands and seals this 30th day of April, A. D. 1890.

CHAS. SWEENY	$3,500.00.	[SEAL.]
W. J. TRETHEWEY	$3,500.00.	[SEAL.]
JAMES JOHNSON	$3,500.00.	[SEAL.]
R. C. VANDERFORD	$2,000.00.	[SEAL.]

TERRITORY OF IDAHO,
County of Shoshone,
} *ss.*:

Charles Sweeny, James Johnson, W. J. Trethewey, and R. C. Vanderford, the persons named in and who subscribed the fore-

60 going undertaking as sureties thereto, being severally duly sworn, each for himself says that he is worth the amount set opposite his name, and for which he hereby becomes surety, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the Territory of Idaho.

CHAS. SWEENY.
W. J. TRETHEWEY.
JAMES JOHNSON.
R. C. VANDERFORD.

Subscribed and sworn to before me this 30th day of April, A. D. 1890.

[NOTARY SEAL.] W. W. HAMMELL,
Notary Public.

Endorsed: In the supreme court of Idaho Territory, January term, 1890. H. Grafton Dulaney *versus* John M. Burke. Undertaking on appeal to Supreme Court of the United States.

Order Approving Undertaking.

The within undertaking, this first day of May, 1890, by me approved and supersedeas allowed.

JAS. H. BEATTY,
61 *Chief Justice of the Supreme Court of Idaho Territory.*

Filed May 1st, 1890.

SOL. HASBROUCK, *Clerk.*

TERRITORY OF IDAHO,
Office of Clerk of Supreme Court, at Boisé City, } *ss:*

I, Sol. Hasbrouck, clerk of the supreme court of Idaho Territory, do hereby certify that the above and foregoing is a full, true, and correct transcript of the case wherein H. Grafton Dulaney was plaintiff and John M. Burk defendant, as taken from the files and records in my office, and that I have carefully compared the same with the originals.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court. Done at Boisé City, the capital of Idaho Territory, this 11th day of October, A. D. 1890.

[Supreme Court Seal, Idaho Territory.]

SOL. HASBROUCK, *Clerk.*

Endorsed on cover: Case No. 14,376. Idaho Territory supreme court. No. 582. John M. Burke, appellant, *vs.* Richard H. Dulaney and John Southgate Lemmon, executors of H. Grafton Dulaney, deceased. Filed October 23, 1890.

Office Supreme Court U. S.
FILED.
FEB 28 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term 1892. Term No. 582.

JOHN M. BURKE,
Appellant,
vs.
RICHARD H. DULANEY, and
JOHN SOUTHGATE LEMMON,
Executors of
H. GRAFTON DULANEY, Deceased,
Respondents.

Appeal From the Supreme Court of the Territory of Idaho.

W. B. HEYBURN,
For Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term 1892. Term No. 582.

JOHN M. BURKE,
Appellant,
vs.
RICHARD H. DULANEY, and
JOHN SOUTHGATE LEMMON,
Executors of
H. GRAFTON DULANEY, Deceased,
Respondents.

Appeal From the Supreme Court of the Territory of Idaho.

Brief of W. B. HEYBURN, for Appellant.

APPELLANT'S STATEMENT OF FACTS.

This is an action upon a promissory note made by the pellant to H. Grafton Dulaney at Salt Lake City, Utah, igust 10, 1883, payable one year after date. The action as between the original parties to the note. The complaint in the usual form. The defendant answers to said com-

plaint that the note was never delivered absolutely to th payee by the maker, but was delivered conditionally: th the delivery was only to become absolute in case he electe to purchase certain mining property upon which he had a option from plaintiff. Transcript page 7, folio 11 and 1

Appellant alleged that he elected not to take the pro erty under the option, and so notified the payee of the fa during the life of the option, and thereupon the said Dul ney entered into the exclusive possession of the premise and has exercised the sole right of ownership as against th appellant ever since. Transcript page 7, folio 12 and 1

That no demand was ever made on him for the paymen of the note or interest prior to the commencement of th suit; that he has not seen, or known the whereabouts of sai Dulaney since he so notified him that he had elected not t take the property under the option, and at the time of givin said notice he expressed his readiness and willingness to con vey the interest which said Dulaney had voluntarily place in the name of appellant to Dulaney at any time on demand and that said notice was in writing. Transcript pages 7 an 9, folio 13.

Appellant made, executed and tendered in court wit his answer a deed for the interest in said mining claims whic said Dulaney had placed in his name, and prayed surrende of said note. Folio 13.

The note mentioned and set forth in the complaint wa given for the consideration and upon the conditions following to-wit: On the 10th day of August, 1892, the plaintiff ha negotiated the purchase of the two mining properties in th American Fork Mining District, Territory of Utah, bein the undivided half of the properties known as the Yanke lode claim and the Mary Ellen lode claim of M. Cullen an Dennis Ryan, and orally agreed with this appellant that h would purchase the said properties and give this appellan the option of becoming the owner of an undivided one-sixt of each of said claims for the same price which plaintiff pai for said interest, to be paid by the appellant to the plaintif one year after date, in the event that the appellant shoul desire to become the owner and purchaser of said interest

The appellant thereupon agreed to accept such option of purchase, and the plaintiff thereupon bought said property.

That in the consummation of the purchase of said properties at the instance solely of the plaintiff, the conveyance therefor was taken in the joint names of plaintiff and defendant, and plaintiff requested defendant to give his note for his share of the purchase price, the same being for the sum of $4,308.80, as set forth in the note declared upon, to be payable one year after date, and then and there agreed with the appellant that appellant could explore, work and develop said mining claim, and, if at any time before the maturity of said note appellant desired to do so, he could relinquish said option of purchase and plaintiff would cancel said note and accept a re-conveyance of the interest so deeded to appellant of said mining claims in full discharge of said note and cancellation thereof, and appellant accepted the conveyances of said claims and executed said note upon the agreement aforesaid, and the consideration of said note was none other or different.

That appellant pursuant to said agreement entered upon and explored the property, and within the year notified the said Dulaney that he was dissatisfied with and declined to take the property, relinquished his said option and in March, 1884, notified the said Dulaney of these facts and proffered his readiness and willingness to convey the interest so appearing in his name upon demand at his own expense and thereupon vacated the property to the plaintiff, who entered upon it and worked the same. The appellant averred his readiness to convey the interest to the said Dulaney and tendered a deed therefor.

Upon these issues the case was brought to trial before the court, without a jury, on December 18th, 1888, and judgment was rendered for the said Dulaney against the appellant in the sum of $5,692.80. A statement for a new trial was duly made; new trial was denied and the appellant appealed from both the judgment and the order denying a new trial. The plaintiff's bill of exceptions is found in the transcript at page 15, folio 26, wherein it appears that the appellant, then defendant, being sworn as a witness on his own behalf was asked:

Q. State whether or not any consideration ever passe for the note you have just identified. To which question th plaintiff then and there by his counsel, objected upon th ground that the same is immaterial, incompetent and inad missible; and the Court sustained the objection, to whic ruling of the Court defendant, by his counsel then and ther excepted. Transcript page 16, folio 26.

Appellant further testified that the said Dulaney bough the mining property named, and came to the Walker Hous in Salt Lake City, in Utah, and wanted plaintiff to run it fo him; that plaintiff said he would not do so unless he got show to get some interest in the property; that said Dulane said he would carry the interest for appellant and that appel lant could take it if he wanted to do so, and if not, defendan could give it up, after seeing the property. An objection wa interposed to this testimony on the grounds that it attempte to vary a written contract, which objection was sustained b the Court, to which defendant excepted. See bill of excep tions, transcript page 16, folio 27.

The appellant testified as follows: "I went to examin the property; Mr. Dulaney agreed to let me have one-sixt interest on a year's option from the time I took charge o the property, management of it, and went to work on it Some time after taking the management of it his cousi came out, Mr. Roger Dulaney, and told me—

Counsel for plaintiff objects to what Mr. Roger Dula ney told witness.

Witness states that at that time the note had not beer given.

The Court: Was this before the note was given?

A. Yes; it lead up to the note.

The objection is sustained by the Court, and exceptio taken by the defendant. Transcript pages 16 and 17, folio 28

Counsel for appellant here offered to prove the conversa tion with the agent of the payee of the note prior to the

making of the note and the circumstances under which the note was given.

The Court says: Under the allegations in the answer the Court excludes the testimony, and defendant excepts. Folio 28.

Appellant then testified: I gave the note; I worked on the property, which was done some time in September; I worked the property until March; I settled up all of its debts, paid them, notified Dulaney that I wanted nothing more to do with the property, that I was going to Idaho Territory—to Cœur d'Alene mines and that I was ready to give him a deed at any time he would send me my note. Folio 28.

The appellant then offered to prove that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price of the interest that Burke was to have, conditioned upon his demanding it, after an inspection of the mining property mentioned; and also offered to prove that after inspecting the property and testing it, Mr. Burke, the appellant and maker of the note, notified Mr. Dulaney, the payee of the note, that he did not want the interest; that he was prepared to make a deed for the interest to Mr. Dulaney and demanded the delivery of his note.

To all of which objection was interposed on the grounds that it was incompetent and immaterial, and the Court held: "It appearing from the evidence the agreement regarding the note was not in wrtting, and under the allegations of the answer, the Court excludes the evidence."

The maker of the note (the appellee) then offered to prove that at the time the note was made, cotemporaneous with the act that the above agreement was made, orally between the plaintiff and defendant, which was objected to on the grounds that it was offered to vary the terms of a written contract, and the objection was sustained by the Court; defendant excepted. Eolios 29 and 30.

The appellant then testified that he was not present at

the time the deed was made in his name to him for the in
est in the mines, and that he never saw the deed, to wh
objection was made by the plaintiff and sustained by
Court; to which appellant excepted.

The defendant below then testified that he was not p
ent when the deed was made, and that it was never delive
to him. Folio 30.

Defendant below was then asked to state whether or
prior to your making the note the plaintiff agreed with
that you could explore, work and develop the mining cla
mentioned in the answer, and if at any time before the
turity of the note you should desire so to do that he wo
relinquish the said option of purchase, and that the plain
would cancel the note and accept the deed in full discha
of the note and cancellation thereof; to which the plain
objected until the agreement was produced. The defend
admitted that the agreement was oral, and on these grou
the evidence is excluded by the Court. Folio 31.

The defendant was then asked:

Q. State whether or not the plaintiff made the agr
ment with you I have just stated, prior to your making
note and agreeing to give it?

To which the plaintiff objected until the agreement
produced in writing, which objection was sustained by
Court; to which the defendant excepted. Folio 31.

The defendant below was then asked:

Q. State whether or not you did examine, work a
develop the mining claims mentioned in the answer?

Counsel for plaintiff objects to the question as irreleva
and immaterial. Objection sustained and exception take

Defendant below was then asked:

Q. State whether or not you refused to take the mini

claim mentioned in the answer under agreement or under any agreement you had with the plaintiff?

Objected to as immaterial and incompetent; objection sustained and exception taken.

The deed filed with the answer and tendered was then shown to the witness, who is asked to state what it is; and states that it is the deed that he tenders back in his answer to Mr. Dulaney for the property in dispute. The deed is set forth in the transcript on pages 19 and 20. The evidence of the deed is objected to, and the objection sustained, to which defendant below excepts.

Defendant below is then asked when he last saw Mr. Dulaney, which is disallowed under objection.

He is then asked:

Q. Was there any other or further consideration for the note that has been shown you than this interest in the mining claim? Which is objected to, the objection sustained, and exception taken by the defendant.

These matters all appear in the appellant's bill of exceptions, found in the transcript, commencing with folio 26 on page 15 and running to page 21.

An appeal was taken to the Supreme Court of the Territory of Idaho. Transcript, page 37. And at the January term, 1890, the judgment of the court below was affirmed by a majority of the bench. Transcript, folio 53. Whereupon an appeal was allowed to the Supreme Court of the United States, and the citation duly issued. See transcript, folios 55, 56 and 57. And the transcript of the record of the case was duly certified by the Supreme Court of the Territory of Idaho to this court. See transcript, folio 61.

The judgment appealed from is found in transcript, page 13, folios 22 and 23.

ASSIGNMENTS OF ERROR.

The appellant assigns as error:

First. The findings of fact made by the Court.

Second. The conclusions of law found by the Court.

Third. The judgment rendered by the Court.

Fourth. The order of the Court denying the defenda a new trial.

Fifth. The refusal of the Court to allow the defendant testify as to the want of consideration for the giving of t note sued upon.

Sixth. The refusal of the Court to allow the defenda to testify as to the oral agreement made between him a the plaintiff at the time of, and prior to, the giving of the no sued on for the purpose of showing that the delivery of t note was conditional.

Seventh. All of the rulings of the Court during the tri of the cause which were excepted to by the defendant, shown by the defeneant's bill of exceptions, contained in t transcript commencing on page 15, folio 26.

Eighth. The refusal of the Court to allow the defenda to prove that the delivery of the note sued on was condition and not absolute, as set forth in the answer.

ARGUMENT.

The first four assignments of error will pass under th general consideration of the questions of law as raised by th other assignments of error.

We do not dispute the doctrine that parol evidence cann be introduced to contradict or vary the terms of the note, r garded as a written contract. This doctrine is too well se tled to admit of argument, but it has no application to th

case at bar, under the pleadings and testimony received and offered.

Our contention is that the conveyance of the mining property to the appellant was not intended as a sale, but was made by Dulaney, the payee of the note, for a certain purpose of his own, and upon an understanding with the appellant that the property was afterwards to be conveyed back, in the event of certain contingencies that might arise, and that this note was given at the time under an agreement that its delivery was conditional, and that it was not to be paid. This fact was sought to be proven by the appellant, and the Court below refused to admit the evidence The answer raises this defense squarely, and in law it was a good defense, and the refusal to receive the evidence was error.

Schindler vs. Muhlheiser, 45 Conn. 153.

McFarland vs. Sikes, 54 Conn. 250.

Benton vs. Martin, 52 N. Y. 570.

Kennedy vs. Goodman, 14 Neb. 585.

Maltz vs. Fletcher, 52 Mich. 484.

Coleman vs. Post, 10 Mich. 422.

Catlin vs. Burchard, 13 Mich. 110.

Bowler vs. Johnson, 17 Mich. 46.

Clark vs. Tappin, 32 Conn. 66.

Dickin vs. Morgan, 54 Iowa 684.

There is a plain distinction between the rule in an action between the original maker and payee of the note, and the rule between the bona fide holder for value and the maker.

There are many defenses that can be made against a note in the hands of an original payee that would avail

nothing as against a bona fide holder without notice of th equities of the maker.

It is plain that the terms of the agreement between th maker and the payee of the note were that the maker of th note was to have the option of disposing of it, either b paying the same, or by deeding back the title of the minin claims to the plaintiff, under the conditions agreed upo He elected to avail himself of the latter means of payme and within the time agreed upon between himself and th plaintiff proffered to do so.

From the transcript page 17, folio 28 and 29, th appellant testifies that in March, 1884, he notified the paye that he wanted nothing more to do with the property; tha he was going to Idaho, and was ready to give him a dee any time he would send him his note. Defendant swear that he gave this notice in writing, and the testimony offere by the defendant below to show that it was agreed betwee the maker and the payee that the note should be given t represent the price of the interest that appellant was to have conditioned upon its payment, is in exact line with th doctrine of the cases above cited.

Maltz vs. Fletcher.

Schindler vs. Muhlheiser.

McFarland vs. Sikes.

So in the testimony offered by defendant, that prior t the making of the note the payee agreed with the make that the defendant might explore, work and develop th mine, and if at any time before the maturity of the said not the maker should desire so to do, he could relinquish hi option to purchase and the payee would cancel the note an accept a deed in full discharge of the note and cancellatio thereof. The evidence received and offered by the defendan was uncontradicted by the plaintiff below, and its truth mus be taken as established, and the only question for this Cour to determine is as to whether or not it was admissible t prove the allegations in the defendant's answer that the not should not become due in the event of his concluding not t

take the property, or that it might be discharged by the deeding of the premises in controversy to the payee.

The answer sets up an equitable defense to the action, and asks for the surrender of the instrument sued on, and we submit that the evidence offered was clearly competent in support of the defense set up.

The doctrine that was relied upon in the Supreme Court of Idaho by the respondent as established in the case of

Brown vs. Spofford, 95 U. S. 480.

Brown vs. Wiley, 20 How. 442.

Stock vs. Howard, 16 Wallace, 564.

Forsyth vs. Kimball, 91 U. S., 291.

All goes to the question of the introduction of parol evidence to vary a written contract. That principle is not in the case at bar. In the case of Brown vs. Wiley, in the 20 How., the defense set up a different agreement as to the time of presentation than that prescribed by law and deducible from the terms of the bill and the Court held that such parol agreement was inconsistent with its terms. In the decision the Court says, "It is admitted that the bill was given *for full value* and the question is presented whether parol evidence should have been received to vary, alter, or contradict that which appears on the face of the bill of exchange." "The contract was perfect the obligation to pay at some time conceded, and its own terms, construed by the law, fixed the time." This holding is consistent with the argument of the appellant, as is the holding of the court in the cases of

Specht vs. Howard, 16 Wall.

Brown vs. Spofford, 95 U. S.

Schindler vs. Muhlheiser, 45 Conn.

The last case is in many respects like the case at bar,

and nearly identicle in principle. The note on which that action was brought was claimed by the defendant to be made for the accommodation of the plaintiff, and hence that it was not a debt of defendant to plaintiff. In the decision of the case the court says: "The note was given pursuant to and in fullfilment of an antecedent agreement between the parties. * * * The plaintiff invokes the familiar rule of law that parole evidence is not admissible to contradict or vary a written instrument. * * * It has for its object the prevention of fraud and perjury, in those cases where the parties have put their contracts in writing, by excluding any other evidence of the terms of the contract than the writing itself. But that is not this case, The contract was not reduced to writing. It was a parol agreement, and provided for the use of the note in suit, and also of the deed for a special purpose. So far the contract has been performed. A further provision in it was that the defendant should reconvey the lands to the plaintiff, and the plaintiff should give up to the defendant his note. This part the plaintiff refuses to perform. He insists that the defendant, contrary to the intention and understanding of both parties, shall retain the land and pay the note. * * * It compels the defendant against his will to become the purchaser of this land. Instead of preventing fraud, such an application of the rule would perpetrate a fraud of the grossest character, and bring reproach upon the law and the administration of justice."

Bush vs. Scribner. 11 Conn., 388.

Case vs. Spaulding, 24 Conn., 578.

Daggett vs. Whiting, 35 Conn. 566.

Downer vs. Chesebrough, 36 Conn. 366.

Dale vs. Gear, 39 Conn. 89.

In Maltz vs. Fletcher, 52 Mich. 484, Chief Justice Cooley says: "It is always competent to show that a contract sued upon is without consideration; and no rule or policy of the law is violated by allowing proof to be made of the purpose for which negotiable paper was was given; or that the purpose does not require that pay-

ment should be enforced." This case is parallel with one phase of the present case. Maltz sued Fletcher on a promissory note, and Fletcher pleaded that it was understood when the notes were given that they were only to be paid if the logs for which they were given should be adjudged, in a certain action then proceeding to test the title to the logs, not to belong to Fletcher. So in Dicken vs. Morgan, 54 Iowa, 684, which was on a promissory note and mortgage, the answer alleged that a part of the consideration of the note was an agreement by parol that the plaintiff should procure a highway to be constructed, etc., which he had failed to do. This was demurred to, on the ground that it sets up a verbal agreement, by which defendant attempts to add to or change the terms of the note and mortgage. The Court says: 'The agreement alleged in the answer did not add to or change the terms of the contract contained in the note, which was to pay the sum expressed therein. That contract is that defendants will pay plaintiff the sum of money named in the notes at the time fixed, with interest. The contract pleaded by the defendants is a distinct and independent contract, which was a partial consideration of the note. It in no sense changes or adds to the terms of the note, and was not intended so to do. Contracts of this kind, where one is the consideration of another, are common business transactions. It has never been thought by those who made them that the contract, which is the consideration, adds to or changes the other; surely the courts never so held.' Citing Thayer vs. Reeder, 45 Iowa, 272; Putman vs. Haltey, 24 Iowa, 425. Such a plea goes to the consideration of the note and behind the cases cited by the plaintiff. So also in Benton vs. Martin, 52 N. Y., 570, which was an action on a duplicate draft by defendant to plaintiff; Judge Folger, in delivering the opinion, says: "Clearly it was competent to show the terms upon which the duplicate was delivered, and for the defendant to restrict and limit his liability thereby, * * * and the annexing of such condition to the delivery is not an oral contradiction of the written obligations, though negotiable, as between the parties to it, or other having notice."

In speaking of this rule excluding oral evidence to vary the terms of a written agreement. Chancellor Kent further says: "It is to be observed that the rule is directed

only against the admission of any other evidence of the language employed by the parties in making the contract than that which is furnished in the writing itself." In the case at bar there is no question as to the language used in the note. The question is only as to the conditions on which it was put in the plaintiff's hands. That the consideration of negotiable promissory notes, the same being concurrent parol agreements, may be enquired into, in an action on the notes, by the payee against the maker, the authorities are numerous and sustain the view that any other rule, or any other application of the rule, excluding evidence to vary the language of the contract, would, in the words of the Court in Schindler vs. Mulheiser, *supra*, "perpetrate a fraud of the grossest character, and bring reproach upon the law and the administration of justice," at least, such result would be likely to follow.

We submit that the agreement set up in the answer in this case and sought to be proved by the defendant upon the trial, was proper to be shown, and that parol evidence was competent to show the same; that such evidence was admissible under the pleadings, and that the several rulings of the court below in excluding the same was erroneous.

Kennedy vs. Goodman, 14 Neb., 585.

Haynes vs. Thompson, 28 N. H., 386.

We ask that the case be reversed and the cause remanded for further proceedings.

Respectfully submitted,

W. B. HEYBURN,

Counsel for Appellant.

Office Supreme Court U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN M. BURKE,
Appellant,

vs.

RICHARD H. DULANEY AND JOHN SOUTHGATE LEMON, *Executors of* H. GRAFTON DULANEY, *deceased,*
Respondents.

Term No. 326.

Appeal from the Supreme Court of the Territory of Idaho.

BRIEF IN BEHALF OF RESPONDENTS.

LEIGH ROBINSON
For Executors of H. G. Dulaney.

Polkinhorn, Printer.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN M. BURKE,
Appellant,

vs.

RICHARD H. DULANEY AND JOHN SOUTHGATE LEMON, *Executors of* H. GRAFTON DULANEY, *deceased,*
Respondents.

Term No. 326.

Appeal from the Supreme Court of the Territory of Idaho.

BRIEF IN BEHALF OF RESPONDENTS.

The judgment from which the present appeal was taken was rendered in an action on a promissory note, which reads as follows: (Rec., p. 1.)

$4,308.80. SALT LAKE CITY, UTAH,
August 10th, 1883.

One year after date, for value received, I promise to pay to H. Grafton Dulaney or order forty-three hundred and eight 80.100 dollars at Wells, Fargo & Co.'s bank, Salt Lake City, Utah, with interest at the rate of six per cent. per year from date until paid.

(Signed) JNO. M. BURKE.

The execution of the note was admitted, and neither by pleading nor by proof was the collection of the note sought to be resisted on the ground of fraud, accident, mistake, or failure of consideration. The appellant says, "In the case at bar there is no question as to the language used in the note." (Brief, p. 14.) He gives the court to understand, that he does not propose "to introduce evidence to contradict or vary the terms of the note." (id. p. 8.) Nevertheless the defence which he seeks to interpose is the following:

At the date of the note the plaintiff had negotiated for the purchase of two mining properties, and proposed to defendant to take *a half interest* therein, and pay therefor by the note in suit, and defendant agreed to do so. (Rec., p. 3.) So far the defendant does not differ from the cause of action. But he seeks further to show that the note which has all the conditions of negotiability in reality was the reverse; that it was delivered with the understanding that it simply represented an option which had been extended to the defendant to purchase the half interest in the property above referred to, at the price named in the note, within the period of one year, or within the same period to decline to do so (id.4). An amended answer alleges the agreement to have been that the plaintiff "would purchase the said properties and give this defendant the option of becoming the owner of the undivided *one-sixth* of each of said claims for the same price plaintiff paid for the said interests, to be paid by the defendant to plaintiff one year after date, in the event defendant should should desire to become the purchaser and owner of

said interests; and defendant thereupon agreed to accept such option of purchase, and the plaintiff thereupon bought the said property." (id. 7.)

No better illustration could be submitted of the wisdom of the rule prohibiting the introduction of parol testimony to vary a written instrument, than the ease with which such parol proof itself can be varied, as exhibited by these two sworn answers—in the first of which the option intended to be proved is an option to purchase a half-interest, and in the second an option to purchase a sixth-interest.

When the subject-matter of a contract is so equivocally remembered, how unfortunate it would be, should all the conditions of written obligations be subject to the hallucinations, perversions, and general mischief of a partial and self-serving memory. The evil against which the rule seeks to guard is the substitution of imaginary conference—and *ex post facto* preference for that cotemporaneous certainty which the parties reduce to writing. The present record shows how ambiguously such reminiscence would construe and how perfectly confuse the clearest possible agreement, which the parties to it put in permanent shape, for the express purpose of keeping it unambiguous and unconfused.

In the case at bar, if the real agreement was the one now sought to be maintained, what motive can be conceived for making the only memorial thereof so diametrically opposite to the fact—so distinct and explicit in misleading form and sense, and so reticent and repellent of the truth? Why should a thoroughly innocent act seek such obstinate disguise?

At the trial the defendant offered to prove: "Mr. Dulaney agreed to let me have this one sixth interest on a year's option," and agreed to do so because, on the plaintiff's application to him to manage the property, defendant said "I would not do it unless I got a show to get some interest in the property" (R., p. 16); and yet the record shows that the deed for this mining property was by agreement a conveyance to the maker and payee jointly (R., pp. 3-7). So that it could not have been a sixth interest as alleged in the amended answer (the one to be sustained), which was the consideration for the note, but a half interest as alleged in the original and superseded answer. Further, it is obvious that the consideration for the note was absolutely *bona fide*, since it is the exact consideration which the payee was willing to receive, and did receive, as the equivalent of an equal expenditure. Further, the offer (p. 16) shows that the agreement was not "at the instance solely of the plaintiff," as alleged in the amended answer (id., 7), but at the instance of and as the condition precedent imposed by the defendant. The contract on which the plaintiff sued was expressed not only by the note (which was all that was required to maintain the action), but by a deed of conveyance of the real estate for which the note was given.

The trial court, sitting without a jury, found "That all and singular the allegations of the complaint are true, and the allegations of the answer herein are not found to be true," and consequently that the plaintiff was entitled to recover (R., p. 12), and rendered judgment accordingly (id., 13).

The whole defence attempted was the offer to prove that the note on which suit was brought was not the

unconditional negotiable paper it purported to be on its face, but had been delivered as the symbol and memento of the option to purchase alleged in the answer, and that defendant had exercised his option by declining to purchase (id., 16 *et seq.*)

It is not easy to conceive of a more complete contradiction and variation of a promissory note to pay a certain sum, at a certain time, to a certain party, than the contradiction and variation and transformation, which would be accomplished, by the admission of proof, to turn a precise and distinct negotiable note into an option to purchase real estate. The paper in suit, which is unconditionally payable a year from date, would be converted into paper of an exactly opposite character, into paper of an exclusively conditional character, with the maker the master of the conditions, and which, at the pleasure of the maker, might be extinguished at any instant of time, within the year the note has to run. If thus to substitute for negotiability, non-negotiability, for necessity, choice, for payment, repudiation, be not to contradict or vary the written instrument, it is hard to see the utility and significance of the rule.

If "parol evidence of an agreement, made contemporaneously with a promissory note, which contains an absolute promise to pay at a special time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, *or to make the payment depend upon condition*" (*Brown* vs. *Spofford*, 95 U. S., 482), how could it be admitted for the revolutionary purposes sought by this defence?

If "it is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill, cannot be permitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written contract" (*Forsythe* vs. *Kimball*, 91 U. S., 84), and there is no fraud, no accident, no mistake to be corrected, by what principle can parol proof turn the paper in suit into an option incapable of transfer or negotiation, over which the holder has no control whatever, but the absolute control whereof is in the maker. An option is delivered by the one who gives it to him who receives it, but this alleged option is reversely treated, the sole memorial thereof being claimed to have been delivered by the donee to the donor.

It will be observed that the trial judge was willing to admit evidence in variation or explanation of the written instrument, if such cotemporaneous agreement was in writing. (Rec., pp. 9 and 10). His refusal to admit was limited to parol evidence of a different or modified contract. The principle thus applied is not, as appellant's counsel suggests, subject to the qualification, that the note must be one which has passed beyond the original parties. In a suit at law, by the payee against the maker, "*evidence is inadmissible to show that the note was not intended to be a promissory note, but was given as a memorandum not to be enforced against the maker.*"

Burnes vs. *Scott*, 117 U. S., 582. In the case cited, the defence sought to show that the note was given by one partner to another partner, at a time when the partnership affairs had not been settled, that defend-

ant was requested as trustee of the partners to make the note, "with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said W. on account of said bonds, in a settlement among said partners;" that the defendant executed the note accordingly, "as trustee of the partnership and not as his individual note, and the plaintiff acquired title to the note with knowledge of these facts." (Id., 584). But this evidence, in the judgment of the U. S. Supreme Court, was properly excluded. "Its purpose was to vary and contradict by an alleged contemporaneous *verbal* agreement the contract which the parties had reduced to writing. It was offered to show that a promissory note in the usual form was not intended by the parties to be a promissory note, but was a mere memorandum by which the maker promised nothing; which gave no rights to the payee, and was to all intents and purposes vain, futile, and of no force or effect whatever. *It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose.*" (Id., 585–586.)

The opinion of the Supreme Court of the Territory of Idaho, affirming the judgment of the District Court, in favor of H. Grafton Dulaney, the plaintiff therein, is annexed to this brief.

LEIGH ROBINSON
For Executors of H. G. Dulaney.

Dulaney v. *Burke.*

Supreme Court of Idaho, March 5, 1890.

Appeal from District Court, Shoshone County.

SWEET, *J.* On August 10, 1883, at Salt Lake City, Utah, John M. Burke executed and delivered a certain promissory note in the sum of $4,308.80 with interest at the rate of 6 per cent. per annum until paid, due one year after date, and payable to H. Grafton Dulaney, or order. Before the maturity of said note defendant Burke became a resident of Idaho territory, and on the 7th day of October, 1887, plaintiff commenced an action in the District Court of Idaho territory, first judicial district in and for Shoshone county, for the collection of said note. Defendant set up as a defense in said action an oral agreement made at the time of or prior to the execution of said note, the substance of which is as follows: "That plaintiff was about to consummate the purchase of two mining claims, and desired the defendant to become the superintendent or manager thereof. To this proposition defendant replied that he did not care to enter into such an arrangement unless there was something in it for him. Plaintiff thereupon offered to purchase the property giving to defendant a one-half interest therein, the defendant to execute to plaintiff his promissory note for one-half the purchase price of said property, at the same time giving to defendant an opportunity to examine and test said mining property; and further agreeing that if after such examination defendant did not desire to pay the note and retain his interest in the property, he might surrender said interest to plaintiff, and that, upon surrendering this interest, plaintiff would cancel defendant's note given therefor. That, in accordance with this agreement, plain-

tiff purchased the property, taking a deed therefor in the names of plaintiff and defendant. That afterwards defendant did examine and test the mines thus purchased and concluded that he did not care to retain his interest in the same, and notified plaintiff that he was ready to execute a deed in favor of plaintiff to his interest in said mines whenever plaintiff would cancel said note. Wherefore he prays judgment against plaintiff for the cancellation of said note, and for his costs," &c.

At the trial defendant offered to prove said agreement, at the same time tendering a deed to the property, and plaintiff objected to the introduction of evidence to such effect, on the ground that it was an attempt to vary the terms of a written contract by parol evidence. The offer thus made was tendered in various forms, and always met by the same objection; and this objection, for the reason above set forth, was sustained by the court. The case was tried without a jury, and the court gave judgment for plaintiff in the sum of $5,692.80. Defendant excepted to the ruling of the court in excluding the evidence by which it was proposed to prove the agreement before mentioned; and the ruling thus made is the error assigned upon which defendant and appellant relies to reverse the order of the court below, overruling defendant's motion for a new trial. Defendant cites *Schindler* vs. *Mulheiser*, 45 Conn., 153, as an authority in support of his interpretation of the law.

Several other authorities are cited by appellant, more or less in line with the case just referred to; but unquestionably *Schindler* vs. *Mulheiser* is the strongest case presented by the appellant as tending to support his claim in the issue at bar. After stating the facts in this case, the court reaches three separate and distinct conclusions. They are as follows: (1) The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties. (2) That agreement shows that it was not given as evidence of any existing indebtedness, but

as a means of accomplishing an ulterior object wholly in the interest and for the benefit of the plaintiff. (3) Consequently the note was an accommodation note, the collection of which would operate as a fraud upon the defendant. We need not quote authorities to establish the principle that fraud vitiates any contract. The quotation of authorities upon this proposition is wholly unnecessary; and we repeat what has already been decided over and over again by every court that has ever considered the question, and what has been declared to be the law by every text writer discussing it, that any contract may be assailed upon the charge of fraud, mistake, or failure of consideration.

We will now consider whether the case at bar comes within any of these rules, or whether it comes within the rule laid down in the case first cited. Defendant offered to prove that the agreement was made prior to the execution of the note. To this extent, it bears some resemblance to the conclusion reached by the court in *Schindler* vs. *Mulheiser*. But after all, no contract can be executed before it is discussed in all its forms and phases, and thoroughly understood and agreed on between the parties; and the execution of a written agreement or contract, in accordance with such a discussion, would not be a fulfillment of an antecedent agreement. It is simply placing the agreement in writing, and thereafter the contents of the written agreement are to bear witness as to the intent of the parties. Beyond this first conclusion, however, the facts ascertained by the court in the case cited do not apply to the matter at bar. It was there found that the note was executed "wholly in the interest and for the benefit of the plaintiff." The note having been executed for the benefit of the plaintiff, it was further found to be an accommodation note, and that its collection would operate as a fraud upon the defendant. There is nothing in this case to indicate such a condition of affairs. Defendant desired "a show to make something for himself." By what course of reason-

ing are we to conclude that it was to the benefit of plaintiff to pay defendant's half of the purchase-price of the property, and accept defendant's note therefor? How did that become an accommodation to the plaintiff? How could plaintiff perpetrate a fraud upon the defendant by advancing the latter's half of the purchase price of this property, and carrying it for him during the time specified in the note? If we were to speculate outside the written conditions of the agreement, we might say that there was more danger of plaintiff giving defendant an opportunity to watch the development of the time for one year, and then, if the progress of the work was such as to discourage its owners, permit him to repudiate the contract, then there would be danger of fraud upon the defendant by generously advancing the money to carry his portion of the purchase price.

Now let us considered the conditions under which parol evidence may be admitted to vary the terms of a promissory note. In *Schurmeier* vs. *Johnson*, 10 Minn., 319, (Gil., 252,) the court in discussing this question says: "It is a rule well settled that in the absence of fraud or mistake parol evidence is inadmissible at law or in equity to vary a written contract. Such a contract cannot be varied, explained away, or rendered ineffectual by parol proof of any conversation or stipulation prior to or contemporaneous with its execution. It is conclusively presumed to set forth the whole agreement of the parties and the extent and manner of their agreements." Does defendant allege fraud as a reason why the plain terms and conditions of this note should not be executed?

Does he aver a failure of consideration? Does he allege mistake? These are the only grounds upon which the plain and specific utterances of a written agreement may be assailed and set aside. Not one of them comes within the proof tendered by defendant at the trial. He admits the execution, admits the consideration, admits the execution of the deed

in his own name, admits that the note calls for the sum agreed to be paid for the property. Clearly, then, he is not within the rule which authorizes a court to set aside the provisions of a written contract upon the ground of fraud, mistake, or failure of consideration. What then does he plead? He sets up, in effect, that the agreement is not all in writing, and asks permission to add to the contract signed by him on August 10, 1883, by inserting a condition concerning which the contract is absolutely silent. It is vain to say that these offers do not tend to vary the terms of a written agreement. An agreement for an option to purchase this half interest would have been as different in substance and effect from the agreement actually before us as it is possible to make one contract different from another. Contracts cannot be added to or taken from in this manner. In *Brown* vs. *Spofford*, 95 U. S., 480, this question is directly passed upon by the court. We quote from the decision: "Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence. And that proposition is universally true where a promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for nonpayment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument."

The court then states the issue involved in *Brown* vs. *Wiley*, 20 How., 442, and approves the same. Further on in the same case (481), the court says: "Attempt was made in a leading case to prove that the payee agreed with the indorser that if he would indorse the note he should incur no responsibility, as the payment was secured by collaterals, and when offered in the circuit court, the evidence was admitted; but the court, when the case was brought here on a writ of error, reversed the judgment, holding

that the evidence should have been excluded," citing *Bank* vs. *Dunn*, 6 Pet., 51. Continuing, and on the same page: "Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract." *Specht* vs. *Howard*, 16 Wall., 564. In the same case the court indorses the quotation already made from 10 Minn., in the following language: "In the absence of fraud, accident, or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing a bill or note cannot be permitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract;" citing *Forsythe* vs. *Kimball*, 91 U. S., 291.

Defendant contends that the payment of this note was dependent upon a condition, or that its delivery was dependent upon a condition, it matters not which. There is nothing conditional about the written agreement. It states clearly and specifically what the maker of the note promised to do. There is no condition about it; and if there was an agreement entered into at the time that the defendant might do something else at his option, it would be a plain contradiction of the terms of the instrument itself. Quoting from *Brown* vs. *Spofford* (482) we find a declaration directly upon this point; "Parol evidence of an agreement made contemporaneously with a promissory note, which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition." Authorities in support of this principle might be continued indefinitely. Those cited have been referred to, not so much to establish the prin-

ciple, because it is conceded by both parties in the matter at bar, as to show, from the similarity of questions involved in the cases referred to, the erroneous position taken by the defendant. Therefore, as the evidence rejected by the court below tended to establish an oral argument different in form, different in purpose, and different in effect from the written contract in issue, and as the effort to change those conditions is not based upon either a failure of consideration, fraud, or mistake, we hold that the court below did not err in refusing to admit the testimony, and that the judgment must be affirmed. (23, P., 915.)

153 U.S. 246
153 U 8246

IN THE

Supreme Court of the United States.

October Term, 1893.

In the Matter of the City National Bank of Fort Worth, Texas.

Motion for Leave to File Petition for Mandamus; Copy of Petition and Brief Thereon.

A. H. GARLAND,
Attorney for Petitioner.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the Matter of the City National Bank of Fort Worth, Texas. On Petition for Mandamus, &c.

Motion for Leave to File a Petition for a Writ of Mandamus, and Brief Thereon.

The City National Bank of Fort Worth, Texas, respectfully moves the court for leave to file the accompanying petition for a writ of mandamus to be directed as therein prayed for; and reference is made to such petition and brief therewith for a full statement of the facts upon which this motion is based, and the objects thereof.

A. H. GARLAND,
Attorney for City National Bank.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

(October Term, 1893.)

IN THE MATTER OF THE CITY NATIONAL BANK OF FORT WORTH, TEXAS.—PETITION FOR MANDAMUS, &C.

Your petitioner would most respectfully beg leave to state that a case in which petitioner was appellant and R. D. Hunter and others were appellees, from the Circuit Court of the United States for the Northern District of

Texas, was reversed by this court (129 U. S., 557), and remanded back with certain directions, by which to carry into effect the decision and judgment of this court.

In due course of time the mandate of this court went to the court below, and was there entered of record, and that court rendered a decree against petitioner for $12,984.85, with interest from the date of the decree, June 2, 1890, at the rate of eight per cent. per annum, and for certain costs; and to so much of such decree as gave interest and costs against petitioner exceptions were made and entered, and an appeal to this court to that extent was asked and granted; but such appeal was, on the 19th March, 1894, ordered by this court to be dismissed for the want of an amount involved sufficient to give this court jurisdiction—the court holding, in effect, that petitioner's remedy in the premises was by mandamus upon the Circuit Court to vacate such decree, and not by appeal therefrom; all of which will more fully appear by reference to the record in such appeal, No. 264, at the present term, and the opinion of the court therein now published and promulgated.

The mandate of this court in such last-named appeal has not yet been issued, and the case still remains in the court, and, therefore, petitioner deems it not necessary to print as exhibits hereto such record and opinion, but will do so if the court desires it to be done.

Petitioner would state further, it appears by the record in such case (264), that when the case was called up to be proceeded with by the Circuit Court, on the mandate of this court, the parties, to simplify and put in as small a compass as possible the questions to be presented on this hearing, entered into the following agreement and filed it in the case:

It is agreed between Hunter, Evans & Co., on the one part, and the City National Bank of Fort Worth, Texas, on the other part, that the proceeds of the cattle in controversy in this case

were paid over to James F. Ellis, one of the securities on the replevin bond, who, for himself and as agent for the other securities on said bond, accompanied said cattle to the Indian Territory and collected the balance due on the note from Dawson to Hunter, Evans and Co. and said City National Bank, and that said Ellis, on behalf of himself and said other securities on said bond, deposited said amount collected by him in said City Na ional Bank as a generst deposit, with the understanding that said money should remain on deposit in said bank to abide the determination of this suit for the purpose of indemnifying them (said securities) against any loss by reason of their signing said bond.

Said deposit was made in the name of the "Dawson bond account," and the amount has remained and still remains on general deposit as aforesaid in said bank.

It is further agreed that said deposit was made at the following da'es and in the following amounts, respectively:

1. June 26, 1880, three thousand one hundred and twenty-eight dollars.

2. August 3, 1880, five thousand dollars.

3. August 6, 1880, five thousand six hundred and forty-four dollars.

Total amount deposited, thirteen thousand seven hundred and seventy-two dollars, which, as other general deposits, has been used by the bank as other of its funds.

It is further agreed that this agreement shall stand in lieu of answer to plaintiff's bill of discovery, and answer to same is hereby waived. (*Rec., 2.*)

And this was the foundation of the decree so made by the Circuit Court.

That such decree is superseded by a good and sufficient bond in the sum of $20,000, dated June 2d, 1890.

That these proceedings were had before Judge A. P. McCormick, then district judge holding a term of the Circuit Court at Dallas, Texas, where he then lived and which is his present place of residence; but since then he has been made a circuit judge for that circuit and he now holds that position, and the Hon. John B. Rector is the district judge for such district, and he also resides at Dallas.

Petitioner feels that it is unjust and illegal to be charged with the interest and cost named in such decree of June 2d, 1890, which now amount to almost the sum of $4,000.00, and such decree, to this extent, is in violation of the mandate of this court heretofore issued in the original appeal (129 U. S., 557), and it should not be permitted to stand.

Wherefore, and as there is no remedy in the premises except by a writ of mandamus from this court, directing the vacating of such order and decree, petitioner prays for a rule to be issued to and upon such Circuit Court to show cause, by a day certain, why such decree should not be set aside and vacated, and on the hearing, this court direct the same to be vacated as to such interest and costs, and the mandate of this court be enforced in conformity with the opinion in the original appeal (129 U. S., 557), and for such other relief as the nature of the case requires, etc., etc.

CITY NATIONAL BANK OF FORT WORTH,
Petitioner.

A. H. GARLAND,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, A. H. Garland, do solemnly swear that I am the attorney for the City National Bank of Fort Worth, Texas, in the above and foregoing motion and petition, and that the facts stated in such petition are true, so help me God.

A. H. GARLAND.

Sworn to and subscribed before me this 2d day of April, 1894.

C. A. NEALE,
Notary Public.

[SEAL]

Brief in Support of the Foregoing Petition of the City National Bank of Fort Worth.

That this remedy is the one and only one the petitioner has, it seems, is beyond question.

In re Washington, &c., 140 U. S., 91;

Gaines v. *Rugg et al. 148 Ib., 228;*

City National Bank, &c., v. *Hunter et al.* (No. 264 at this term; Opn., 19 March, 1894, per Mr. Justice Harlan.

Then, is the bank chargeable with interest on the amount of the decree?

This court, when it passed on the case before (129 U. S., *sup.*), had the whole matter before it, and disposed of it fully, as far as could then be done, and it was silent as to any interest of this sort, while *rule 23* of this court stood before it, as a permanent and exacting reminder for justice, by way of compensation for all improper delays and withholdings in payment of money. And this rule, differing then in number, in connection with the statute allowing interest, etc., was happily commented on by Mr. Justice Story in *Boyce* v. *Grundy* (*9 Pet., 275*). This case (9 Pet.), with others (140 U. S., 5 Cr., 10 Wheat.), denied the allowance of interest by the court below, after the mandate which gives not interest goes down. The argument might stop here.

But is the bank thus liable on general principles of law?

The agreement of the parties in this case (Rec., 2) shows the character of this deposit as it was found by this court (129 U. S., 564–'5) "*on the Dawson bond account*" to remain as a general deposit "*to await the result of this suit.*"

The general law, regardless of the peculiarity of this

deposit, would forbid any demand for interest on this more general deposit.

Foley v. *Hill, 1 H. L. Cas., 39–40;*
Haswell v. *Farmers, &c., 26 Vt., 100;*
Duncan v. *Magette, 25 Tex., 245;*
Newmark Bk. Deposits, sec. 114;
Boone Corp., secs. 219–220.

And this court, in passing upon the question of liability of banks for interest on deposits, rests it on grounds completely negativing the idea of interest in cases like this—a general deposit—the bank being a mere stakeholder or depositary at most.

National Bank v. *Graham, 100 U. S., 699;*
National Bank v. *Mechanics, &c., 94 Ib., 437.*

And this is in harmony with the general principle of law as to deposits where the depositary is a mere stakeholder, and he is not found to be in default.

Story Bailm., sec. 45; Ib., 123 (3 edn.);
1 Domat (Cushing edn.), p. 338, art. 10 (Cl., 721); p. 617, art. 2 (Cl., 1587).

But again, *sec. 4507, Tit. 90, R. S., Texas* (*Sayles*), provides, in short, that if the defendant replevy the property he should not be liable for the rents, hire, or revenue thereof; this is applicable here, for the reason that the money is simply the proceeds of the cattle, and if the cattle had been returned in kind there would have been nothing to pay, and certainly it was optional whether the cattle should be returned in kind or the value of the cattle accounted for. This local law of Texas must, in the nature of things, have conclusive weight in this proceeding, as it is upon Texas laws alone, in the absence of congressional legislation, the law as to this question is to be determined.

Massachusetts, &c., v. *Miles, 137 U. S., 689.*

Again, the opinion of this court (129 U. S., *sup.*), plainly indicated that the plaintiffs were at fault in suing out the writ of sequestration, in that they had no title or right to the property in question; that the writ of sequestration was wrongfully obtained, and that they were not entitled to interest upon the value of the cattle. And while upon this subject the attention of the court to the strong and emphatic language of the opinion in this line is most earnestly asked. (P. 571, *et seq.*) That can leave no doubt at all of the correctness of our view of this transaction. But if the court should hold that interest is recoverable, then it is certain that the opinion should be taken as holding, in effect, that interest was recoverable against Dawson and that it was not intended that the bank should pay this interest, the bank being, as before said, simply a stakeholder, or, at most, a depositary.

As for the judgment against the bank for costs, we think that is palpably erroneous, for the court indicates throughout that plaintiffs below were in default. Indeed, the court in such opinion intimated most clearly that were it not for the fact that the money was shown to be on hand that it would order plaintiff's bill to be dismissed. And as costs are in the nature of damages or punishment for default, and we have shown the bank is not in default, the same reasons that relieve it of interest will also relieve it of costs.

It is obvious, then, the lower court did not proceed upon the mandate in this case, *in conformity with the opinion of this court*, but flew in the face of it in awarding interest and costs, and therefore this court is respectfully asked to direct that decree to be vacated.

A. H. Garland,
For Petitioner.